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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~283~~. 631

PHILADELPHIA BAR ASSOCIATION

LYDIA C. HALL, WIDOW, AND CARRAET R. HALL, ALICE C. HALL, JANE R. HALL, JAMES P. HALL, TIMOTHY W. COOLIDGE, AND ANNA C. COOLIDGE, HEIRS AT LAW OF SAMUEL PARKER HALL, DECEASED, DEVISEE OF J. S. LORING, DECEASED, AND W. W. CHAPMAN, ADMINISTRATOR OF SAID J. S. LORING, DECEASED, APPELLANTS,

vs.

EDWIN RUSSELL AND MARGARETTA V. RUSSELL, HIS WIFE, W. W. PAGE AND ALBINA V. PAGE, HIS WIFE, AND GEORGE H. WILLIAMS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 20, 1876.

3 Oregon 464,
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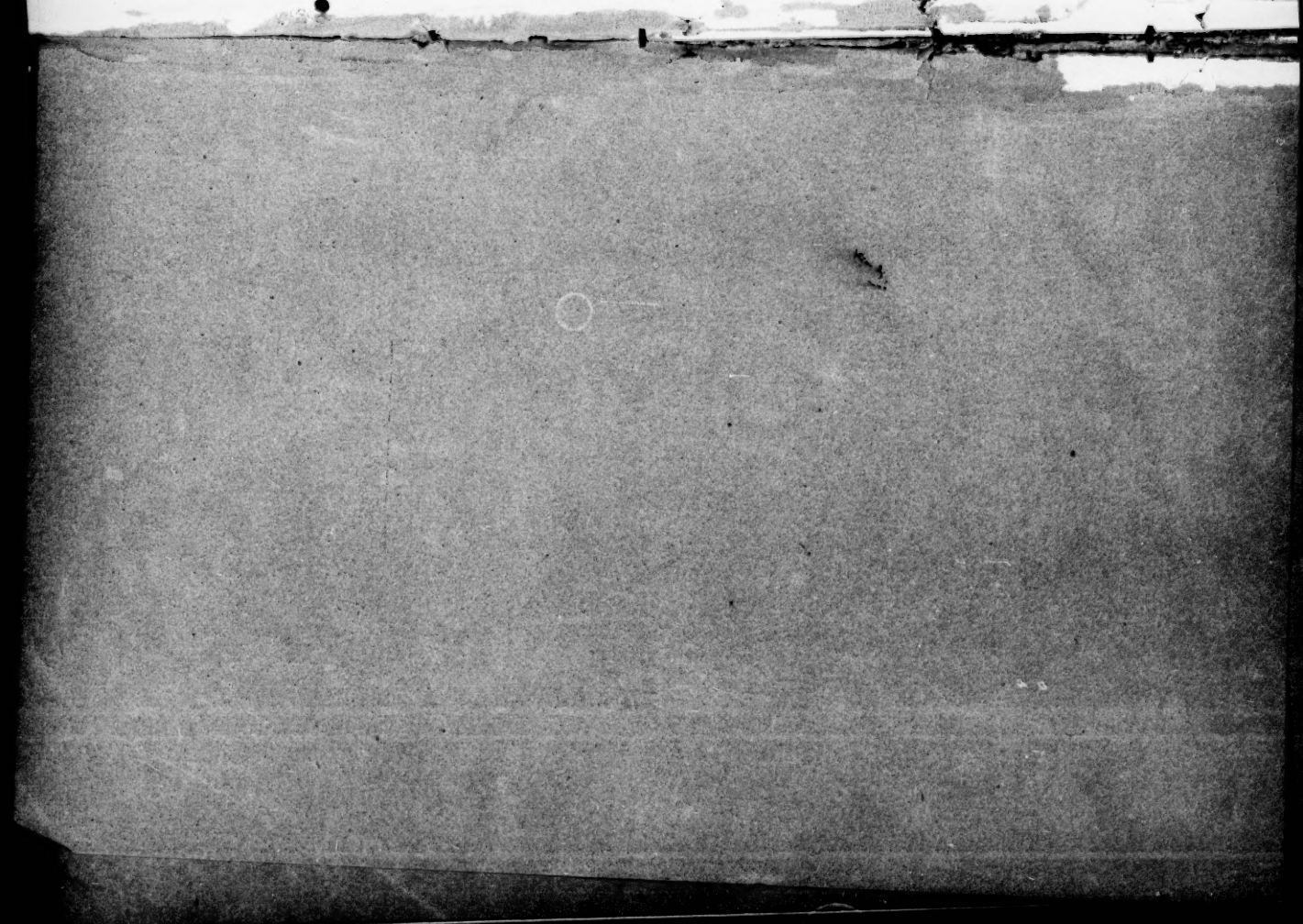

SUPREME COURT OF THE UNITED STATES.

No. 283.

LYDIA C. HALL, WIDOW, AND CARRIE R. HALL, ALICE C. HALL, JANE R. HALL, JAMES P. HALL, TIMOTHY W. COOLIDGE, AND ANNA C. COOLIDGE, HEIRS AT LAW OF SAMUEL PARKER HALL, DECEASED, DEVISEE OF J. S. LORING, DECEASED, AND W. W. CHAPMAN, ADMINISTRATOR OF SAID J. S. LORING, DECEASED, APPELLANTS,

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1 In the circuit court of the United States for the district of Oregon.
In equity.

LYDIA C. HALL, WIDOW OF SAMUEL PARKER Hall, deceased, and Carrie R. Hall, Alice Hall, Jane R. Hall, James P. Hall, Anna C. Coolidge, formerly Anna C. Hall, and Timothy W. Coolidge, her husband, heirs at law of the said Samuel Parker Hall, deceased, devisee of James L. Loring, deceased, W. W. Chapman, administrator, with the will annexed, of James L. Loring, deceased, complainants,

vs.

EDWIN RUSSELL AND MARGARET V. RUSSELL, his wife, W. W. Page, and Albina V. Page, his wife, and George H. Williams, respondents.

To the hon. the judges of the said court:

The complainants in the above-entitled suit represent to the court that on the 20th day of August, 1849, the above-named James L. Loring, then of Cincinnati, Ohio, late of Clackamas County, Oregon, being of sound mind, made his last will and testament in writing, duly executed and attested, valid and binding under the laws of Oregon, by which he devised and bequeathed, after the payment of his funeral expenses and just debts, and two thousand dollars to Thomas Wheeler, and five hundred dollars to the Orphans' Asylum of Cincinnati, kept by Protestant ladies, all the rest of his estate, real, personal, and mixed, of which he should be seized and possessed or to which he should be entitled at the time of his decease, to the said Samuel Parker Hall,
2 which said will was duly admitted to probate by the said county court of Clackamas County, on the 20th of June, 1870, and remains in full force and effect. That the said Loring, by the said last will and testament, appointed the said Samuel Parker Hall his sole executor of said will. That since the death of the said Loring, and prior to the said 20th of June, 1870, the said Samuel Parker Hall departed this life without having qualified as such executor, leaving the complainants the said widow and heirs at law.

Complainants further represent that on the 20th day of June, 1870, W. W. Chapman was appointed by the Clackamas County court administrator, with the will annexed, of the said Loring, qualified and authorized in that behalf.

Complainants further represent that about the first day of April, 1852, in pursuance of an act of Congress approved the 27th day of September, 1850, commonly called the "donation law," the said James L. Loring become a personal resident and settler upon a donation claim, embracing what is known and designated upon the plats of surveys of public lands of the United States in Oregon as lots 2, 3, 4, and 5, in section 27, lots 3 & 4 in section 26, the south half of the northeast quarter of section 27, the north half of the southeast quarter, the south half of the southeast quarter of the northwest quarter, and the northeast quarter of the southwest quarter of section 27, all in township one north, of range one east, in the Willamette land district. That the said Loring, at the time of his said settlement, was a free white male citizen of the United
3 States, over twenty-one years of age, unmarried, and had become

a resident of the Territory of Oregon before the first day of December, 1850. That the lands so claimed by the said Loring on the first day of April, 1852, were public and unoccupied lands of the United States, except as they were occupied by the said Loring, and were so subject to be taken and settled upon as a donation claim by said Loring, by virtue of the said act of Congress; and from the said first day of April, 1852, until his death the said Loring continued personally to reside upon and cultivate the said donation claim.

That on the 20th of April, 1852, the said Loring duly made and filed his notification with the surveyor-general of Oregon in his office at Oregon City, which was numbered 255 (being then a residuary claim), and on the same day made and filed before the same officer an affidavit that he was a white settler upon the public lands in Oregon, a resident thereof before the first day of December, 1850, and a native-born citizen of the United States, and was born in New York City in the year 1809, and had personally resided upon and cultivated that part of the public lands in Oregon particularly described in said notification 255, continuously from the 12th day of April, 1852, till the said day of making the said affidavit; and in accordance with the 12th section of said act the said Loring, on the same day, and at the same place, and before the same officer, made and filed in said office another affidavit, commonly called the settler's oath, and in the month of January, 1853, at his residence on said donation claim departed this life, having done and
4 performed all things, by the said act of Congress required of him to have been done and completed respecting the said donation claim.

Complainants further represent that shortly after the death of the said Loring therebeing no information in Oregon that he, the said Loring, had made and executed a will, William W. Chapman was appointed by the county court of Clackamas County administrator of the estate of the said Loring, and proceeding to the discharge of the duties thereof, found his dwelling upon the lands aforesaid to consist of a front and rear building adjacent to each other; the housel goods, wearing apparel, etc., of said Loring principally in the front building, and his cattle and other personal property on and about the place and neighborhood. The property consisted mainly of oxen, cows, hogs, chickens, farming implements, and provisions. He also found one Joshua Delay and Sarah Delay, his wife, residing in one or both of said buildings.

Complainants further represent that, as your complainants are informed and believe, and so charge, that the said James L. Loring, a few weeks before his death, took the said Joshua and Sarah Delay, his wife (who were very poor people), upon his farm, the said Joshua to reside with him as a tenant or cropper for the period of two years, using his team, farming implements, stock and provisions, etc. That the parties continued during the life-time of the said Loring to carry out the said arrangements, the said Loring for the most of the time having one or more hired hands working upon said donation claim. That
5 after the said Loring's death, and after the personal property was disposed of by the said administrator, for the first time, as complainants are informed and believe, the said Joshua Delay denied his said relation to said Loring to be that of a tenant, and set up a claim to the land as his own. That the said administrator proceeded before the register and receiver with the trial of the right of the said Loring to said claim, which was contested by the said Delay until his death, which occurred some time in the year 18 , and afterwards by his heirs at law, William H. Delay and Joseph Delay.

That proofs were taken, and the said administrator caused the necessary proof of the compliance on the part of the said Loring with the requisites of the said donation law up to the time of his death, as are specified in the 8th section of the said act of Congress, and thereupon the proper register and receiver of the land-office overruled the claim of the said Delay, and awarded that the same was the right of the said Loring at the time of his death, and having adjusted the boundaries with adjoining claims, issued and delivered to the administrator a patent certificate to the heirs at law of said Loring for the donation claim aforesaid, which certificate bore date the 27th day of October, 1864.

That the said Delays appealed the same to the Commissioner of the General Land Office, who, upon thorough examination, gave a written decision affirming the decision of the register. And thereupon the said Delays appealed the case to the Secretary of the Interior; and the Acting Secretary, without assigning any reason, reversed the decision of the Commissioner and register.

6 That the said W. H. and Joseph Delay having left the said claim, and Josiah Boggs and others being in possession thereof, such proceedings were had in the circuit court of the State of Oregon for the county of Multnomah as that, on the day of December, 1864, judgment was by said court rendered, and remains unreversed, that the said W. W. Chapman, as administrator of the estate of the said James L. Loring, recover the possession of the said tract of land, and on the 6th day of February, 1865, the sheriff of said county, in due form of law, placed him in possession thereof; that the said administrator of the estate of the said Loring continued in the possession of the said lands thenceforward until, as hereinafter mentioned, he was unjustly turned out of the possession.

The complainants further show to the court that after the death of the said Loring the said Joshua Delay and Sarah Delay, having set up some pretended claim to that portion of the lands above described as his within the following described tracts, to wit, lots No. 1, 2, 3, 4, section 26; lots No. 3, 4 and 5, the southeast quarter of the N. E. $\frac{1}{4}$, the north $1\frac{1}{2}$ of the S. E. quar., and the northeast quarter of the S. W. quarter of section 27, all in township one north, of range No. 1 east, in the district of lands subject to sale at Oregon City, the said Joshua and Sarah Delay in their life-time, and one Joseph Delay and one William H. Delay, children and heirs at law of the said Joshua and Sarah, combining and confederating together and with other persons, have falsely and fraudulently represented to the land-office at Oregon City, and to the Commissioner of the General Land-Office at Washington City, and to

7 other officers of the United States having charge of such matters, that said Loring had not settled upon said lands by him claimed as above on the said first day of April, 1852, and had not personally resided upon and cultivated the same up to the time of his death.

That at the time of his death the said lands were public and unoccupied lands of the United States, subject to be taken by the said Joshua and Sarah Delay as a donation claim; and that said Loring had not at the time of his death complied with the conditions and requirements of said act of Congress of September 27th, 1850.

That the said Joshua and Sarah Delay in their life-time, and since their death the said William H. Delay and Joseph Delay, have falsely and fraudulently represented to said register and receiver, and to the Commissioner of the General Land-Office, and other officers of the government having such matters in charge, that Joshua and Sarah Delay of right could and did settle upon said land as donation claimants under

said act of Congress, and that at the time of the death of the said Joshua and Sarah they had complied with the condition of said act.

That by means of said false and fraudulent representations, and by said Joshua and Sarah Delay, and by said W. H. Delay and said Joseph Delay combining and confederating together and with other persons, and by their frauds and misrepresentations, a patent was issued to the said heirs at law of said Joshua and Sarah for the following portions of the said Loring's donation claim as awarded him by the register and receiver, to wit, lots Nos. 3 & 4 of section 26, lots 2, 3, 4 and 5 of section 27, the southeast quarter of the northeast quarter, the
8 north half of the southe[illegible] quarter, and the northeast quarter of the southwest quarter [illegible] section twenty-seven, in township one north, of range one east, in [illegible]illamette district, bearing date the 9th day of May, 1866, was issued to the heirs at law of the said Joshua and Sarah Delay.

Complainants further represent that the lands last mentioned as a part of the donation claim of the said Loring embraced the residence and improvements of the said Loring, and that the residence of the said Delay, as claimed by him, was the same occupied by the said Loring to the time of his death; that the said William W. Chapman, as administrator of said Loring's estate, having recovered the possession of said premises as aforesaid, and continued therein by himself and tenants the said William H. and Joseph Delay, and Lansing Stout, who had purchased an interest therein about the 18th day of May, 1867, entered suit at law against the said administrator and his tenant to recover the possession of said premises; that the said Lansing Stout, and J. H. Reed, and W. W. Page appeared as attornies; that such proceedings were had under the laws of Oregon, as that the defendant filed an answer in the nature of a cross-bill in equity, upon which a decree was entered declaring that the said James L. Loring had settled upon said claim, and had done and performed all things required by law to the time of his death on the premises, on the 23rd of January, 1853, and that the patent should, and of right ought to, have issued to the heirs at law of the said James L. Loring, deceased, and that the patent had been wrongfully and fraudulently issued to the said heirs at law of the
9 said Joshua and Sarah Delay; that the transfer to Lansing Stout was with notice, and should be set aside, and that the said W. H. and Joseph Delay be the holders of the legal title in trust for the benefit of the heirs at law of said Loring, and that they should execute the necessary deeds of release, &c.

That from said decree said parties appealed to the supreme court of the State of Oregon. That the said supreme court upon examination of the case held that the heirs at law of said Loring, if entitled to said premises "took the same by purchase and not by descent," and therefore that the administrator was not entitled to have and maintain his defence.

That thereupon the administrator appealed to the Supreme Court of the United States, and on the trial of appeal, the court consisting at the time of but eight justices, the judgment was affirmed on division of the court.

Complainants further represent that on the 16th day of January, 1869, the said Joseph Delay, and William H. Delay and Zorila, his wife, executed a conveyance to Lansing Stout, of the undivided one-half of said parcels or pieces of ground so wrongfully patented to them, describing it as the same now in controversy between the heirs at law of James L. Loring, deceased, and the heirs at law of Joshua Delay, deceased, the

expressed consideration in said deed being one dollar, but the real consideration, as your orators are informed and believe, and so charge, was the services of the said Stout as an attorney in the controversy. And on the 20th of October, 1869, said Lansing Stout, and Susan C. Stout, his wife, conveyed by deed the undivided one-half of said one-half of said lands to W. W. Thayer, for the nominal consideration of one
10 dollar, the real consideration being, as your complainants are informed and believe, and so charge, the services of said Thayer as attorney at law, in assisting Stout and W. W. Page, in the controversy referred to.

That on the 2nd day of October, 1869, W. H. Delay and Zorila, his wife, conveyed to W. W. Page the whole tract above described for the expressed sum of $600. And on the 20th day of October, 1869, the said W. W. Page and Albina V. Page, his wife, conveyed to Lansing Stout the one-half of one-fourth of said premises, reciting in said deed that "the interest herein conveyed to me by William H. Delay and wife, heirs at law," &c.

That on the 6th day of September, 1871, the said Lansing Stout and wife conveyed by deed to George H. Williams and Edwin Russell, the defendants herein, the undivided one-half of the undivided three-fourths of the before described premises. And on the 6th day of March, 1871, the said W. W. Thayer and wife conveyed by deed to Edwin Russell, for the consideration of one dollar, the one-half of the land conveyed by W. H. Delay and wife, and Joseph Delay, to Lansing Stout, and on the 4th day of October, 1871, Joseph Delay sold and conveyed all his interest in the lands before described to said Edwin Russell and George H. Williams, for the expressed consideration of $1,500.

That, as complainants are informed and believe, and so charge, at the several times of executing and delivering the said several conveyances herein before mentioned, the said Lansing Stout, W. W. Thayer, W. W. Page, George H. Williams and Edwin Russell, and all and each of them respectively, had full notice of the said claim of said James L. Loring, and of his heirs at law, and of his estate of *estate of* his said will and devisees.

11 Complainants further represent that, as they are informed and believe, the said defendants set up a pretended claim to said lands by virtue of an alleged conveyance purporting to be from the heirs at law of the said James L. Loring, deceased.

Now complainants aver that if there exists any such conveyance, that, as they are informed and believe, the said pretended heirs at law did, on or about the 9th day of October, 1871, institute suit in the circuit court of the State of Oregon for the county of Multnomah, against the said defendants herein, Williams, Russell and Page, for the same lands, and upon the same grounds and relying upon the same evidence as had the said complainants in the former suits and proceedings. That on the 17th day of October, 1871, the said suit was transferred to this honorable court, and an amended bill filed, to which the said defendants last named made their joint and severa lanswer, in which among other things they set up as a defense the due execution of the said last will and testament of the said Loring, its due admission to probate by the county court of Clackamas County, and alleging that all the rights of the said Loring in the said lands vested in the devisee, the said Samuel Parker Hall; yet the said defendants herein combining and confederating together and with the said professed heirs at law of the said Loring, and intending wrongfully and unjustly to deprive the devisees and legatees of the benefits intended by the said Loring to be conferred upon them

by his said last will and testament, did, on or about the 7th day of October, 1872, compromise the said last mentioned suit upon the alleged basis of the payment by said defendants to the said professed heirs of the sum of $5,000, and the execution of a conveyance of said
12 lands by the said professed heirs at law to the said defendants. That the lands so conveyed, as complainants verily believe, are of the value of $100,000 or more, and that the sum so professed to have been paid was greatly inadequate as a consideration therefor.

Now complainants aver that, as they are advised and believe, that if the said heirs at law of James L. Loring, deceased, obtained any rights in and to the said lands by virtue of the said Loring having complied with the provisions of the donation law, that they descended to them subject to his said last will and testament, and continue to be so subject in the hands of the said defendants, of all of which the said defendants had notice before and at the time of the execution and delivery of the alleged conveyances by said heirs.

Complainants further represent that the said Edwin Russell is an alien, being a subject of the United Kingdom of Great Britain and Ireland; that the said George H. Williams is not an inhabitant of the State of Oregon, but is a citizen of the District of Columbia, and that W. W. Page is a citizen of the State of Oregon, and that the complainants are citizens of the State of Ohio, and that the lands in controversy are situate, lying, and being in the State and district of Oregon.

Your complainants further represent that, as they are informed and believe and so charge, the defendant W. W. Page caused the said Edwin Russell to be invested as trustee for the use and benefit of Albina V. Page, his wife, with an undivided one-sixth part in the said tracts of land, and caused the said Edwin Russell and Margaret V. Russell, his wife, by deed bearing date the 18th day of October, 1872, to con-
13 vey the same to said Albina V. Page, to her sole and separate use free from the debts or contracts of her said husband; that the said trust was created without any valuable consideration, and with notice of the claim of the said Loring, of his heirs at law, and of his said last will and testament, and of the various matters and things before set forth as being within the knowledge of the said W. W. Page, defendant.

That the said defendants profess to have laid out a town upon said tract of land and called it Albina, and mapped the same into lots and blocks, designating them by numbers; that the said town was laid out and numbered with a full knowledge on the part of said defendants of the matters and things hereinbefore set forth as being within the knowledge of the said defendants Williams, Russell and Page.

That on the 26th day of March, 1873, the said defendants by deed of that date made partition of the blocks hereafter designated; to the said George H. Williams blocks Nos. 1, 4, 7, 10, 13, 15, 19, 28, 25, 32, 31, 34, 37, 42, 51, 55, 58, 70, 73, 76, and 81, and river lots Nos. 1, 4, 7, 10, 13, 16; to said Russell 3, 6, 9, 12, 15, 18, 21, 27, 30, 33, 36, 41, 48, 53, 54, 57, 69, 72, 77, 80, 83, and river lots 3, 6, 9, 12, and 15; to the said W. W. Page Nos. 2, 8, 14, 25, 32, 52, 59, 74, 75, and 82, and river lots Nos. 2, 8, 14, and 19; to Albina V. Page the following, to wit, No. 5, 11, 17, 29, 23, 33, 38, 47, 56, 71, 79, and river lots Nos. 5, 11, and 17 to her own sole and separate use. That the said deed of partition and laying out and mapping the said town were without consideration, and with full notice of the matters and things hereinbefore set forth as being within the knowledge of the said defendants, and are wrongfully and unjustly appropriating and encumbering the said Loring estate, and to the

manifest prejudice of the rights of the creditors, legatees and devisees of said Loring.

Complainants further represent that they are informed and believe that said defendants pretend to have disposed of divers and sundry pieces and parcels of said land to alleged innocent purchasers for sundry large and valuable considerations. Now complainants aver that if any such facts exist that the proceeds thereof in the hands of the said defendants are the property of the complainants, and that of right the said defendants are bound to account to complainants therefor.

Wherefore complainants pray that defendants be compelled to answer this bill (which complainants waive being under oath), and that, the premises considered, that the said deeds of partition, conveyances to each other, or trusts created for the benefit of either of said parties out of or upon said lands, and especially said deeds of the 18th of October, 1872, and 26th of March, 1873, be set aside and held for naught, and that every gift, grant, or conveyance by which any interest is vested in the wife of either of said parties may be rescinded and annul'ed, and the said George H. Williams, Edwin Russell, and W. W. Page be declared to be the holders of the legal title to the said lands embraced in the donation claim of the said James L. Loring in trust for the use and benefit of the complainants, subject only to the payment of any just debts against the estate of said Loring and the said legacies to the said Wheeler and the said orphan asylum, and that the said George H. Williams, Edwin Russell, and W. W. Page do each of them, within thirty days from the entry of the decree herein, make, execute, and deliver to the complainants a good and sufficient deed or deeds duly acknowledged, conveying to the complainants all their and each of their right, title, interest, claim and demand of, in and to the premises in dispute, and that the complainants have such other, further and general relief as to equity appertains, and complainants will ever pray.

MASON & ATWATER,
Solicitors.

W. W. CHAPMAN, *Sol.*

U. S. circuit court, district of Oregon.

I, W. W. Chapman, one of the above-named complainants, being duly sworn deposeth and say that the statements in the foregoing bill are true as he verily believes.

W. W. CHAPMAN.

Subscribed and sworn to before me this October 2d, 1875.
RALPH WILCOX, *Clerk.*

(Indorsed:) In the circuit court of the United States for the district of Oregon. No. 244. Lydia C. Hall, widow, and Carrie R. Hall and others, heirs at law of Sam'l Parker Hall, deceased, et al., compl'ts, vs. Edwin Russell & wife, W. W. Page & wife, and George H. Williams, respondents. Copy of bill. Filed October 2, 1875. Ralph Wilcox, clerk.

16 *Subpœna.*

In the circuit court of the United States for the district of Oregon.

LYDIA C. HALL, WIDOW OF SAMUEL PARKER Hall, deceased, and Carrie R. Hall, Alice Hall, Jane R. Hall, James P. Hall, Anna C. Coolige, formerly Anna C. Hall, and Timothy W. Coolige her husband, heirs at law of the said Samuel Parker Hall, deceased, devisee of James L. Loring, deceased, and W. W. Chapman, administrator with the will annexed of James L. Loring, deceased, complainants,
vs.
EDWIN RUSSELL AND MARGARET V. RUSSELL his wife, W. W. Page and Albina V. Page his wife, and George H. Williams, defendants. } In equity.

The President of the United States of America to the above-named defendants, greeting:

We command you, and every of you, that you be and appear in the circuit court of the United States for the district of Oregon, at Portland in said district, on Monday, the 6th day of December, A. D.
17 1875, then and there to answer the exigency of the bill of complaint filed against you by Lydia C. Hall and others, the above-named complainants, in a suit in equity; and you the marshal of said district, or your deputy, shall make due service of this writ of subpœna, and have you then and there the same.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said circuit court hereto affixed, this 2nd day of October, A. D. 1875.

[SEAL.] (S'd) RALPH WILCOX, *Clerk.*

The defendants are to enter their appearance in the clerk's office on or before the first Monday of December next, otherwise the bill of complaint will be taken pro confesso.

(S'd) RALPH WILCOX, *Clerk.*

18 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named Edwin Russell, by exhibiting same to his wife, and by delivering to her personally for him a true copy thereof, together with a copy of the complaint in the within action, at Portland, in said district, on the 2nd day of October, A. D. 1875.

(S'd) D. J. MALARKEY, *U. S. Marshal,*
(S'd) By W. P. BURNS, *Deputy.*

DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named Marg'et Russell, W. W. Page and Albina Page, by exhibiting same to each of them, and by delivering to each of them personally a true copy thereof, at Portland, in said district, on the 2nd day of October, A. D. 1875.

(S'd) D. J. MALARKEY, *U. S. Marshal,*
By W. P. BURNS, *Deputy.*

(Endorsed:) Returned & filed October 4, 1875. (S'd) Ralph Wilcox, clerk.

19 *Demurrer to bill of complaint.*

In the circuit court of the United States for the district of Oregon.

LYDIA C. HALL, CARRIE R. HALL, ALICE Hall, Jane R. Hall, James P. Hall, Anna C. Hall, now Anna C. Coolige, and Timothy W. Coolige, and W. W. Chapman, administrator with the will annexed of James L. Loring, deceased, complainants,

vs.

EDWIN RUSSELL, MARGARETTA V. RUSSELL, W. W. Page, and Albina V. Page, his wife, and George H. Williams, defendants.

The defendants, W. W. Page and Albina V. Page, by protestation, not confessing all or any of the matters or things in said complainants' bill to be true in such manner or form as therein set forth and alleged, do demur to the said bill, and for causes of demurrer assign—

1st. That there is a misjoinder of parties plaintiffs.

2nd. That the said W. W. Chapman nowhere shows that he has any right to maintain any suit against these defendants.

20 3rd. That the said bill is multifarious, in that these defendants are improperly joined with the above-named co-defendants, because their interests are distinct.

4th. That the said complainants have not by the said bill made such a case as entitled them, or either of them, in a court of equity, to any discovery from these defendants or either, or any relief against them, or either of them, as to the matters contained in the said bill, or any of such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of any avail to the complainants, or either of them, concerning any such matters, nor entitle the complainants to any relief touching the matters complained of.

5th. That neither of the complainants, nor any of them, have any interest in the subject matter of the suit, nor any title to institute a suit concerning it.

6th. That the matters and things set forth in the bill as grounds for relief were had, done, and transpired before the commencement

21 of this suit, more than five years from the alleged date of the patent, to wit, May 9th, 1866. Wherefore, and for divers of other good causes of demurrer appearing in the said bill, these defendants do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to make any other or further answer to said bill, and that they be dismissed hence with their costs in this behalf sustained.

(S'd) W. W. PAGE,
GEO. W. YOCUM,
Counsel for W. W. & A. V. Page, Def'ts.

DISTRICT OF OREGON:

We, the undersigned counsel for the defendants, joining in the foregoing demurrer, certify that we have carefully examined the same, and that it, in our opinion, is well founded in law.

(S'd) W. W. PAGE,
GEO. W. YOCUM,
Counsel for Defendants W. W. & A. V. Page.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, W. W. Page, being first sworn, say that I am one of the defendants in the foregoing-entitled suit, and that I am the husband of
22 Albina V. Page, who joins me in the foregoing demurrer, and that said demurrer is not interposed for delay.

(S'd) W. W. PAGE.

Subscribed and sworn to before me this 18th day of October, 1875.

(S'd) RALPH WILCOX, *Clerk.*

(Endorsed:) Filed October 18, 1875. Ralph Wilcox, clerk.

23 In the circuit court of the United States for the district of Oregon.

LYDIA C. HALL, CARRIE R. HALL, ALICE HALL, Jane R. Hall, Jane P. Hall, Anna C. Coolige, Timothy Coolige, & W. W. Chapman, complainants,

vs.

EDWIN RUSSELL, MARGARETTA RUSSELL, W. W. Page & Albina V. Page, and George H. Williams, defendants.

The defendants Edwin Russell and Margaretta V. Russell, by protestation, not confessing all or any of the matters or things in said complainants' bill to be true in such manner or form as therein set forth and alleged, do demur to the said, and for causes of demurrer assign:

1st. That there is a misjoinder of parties complainant.

2d. That said W. W. Chapman nowhere shows any right to maintain this suit against these defendants.

3rd. That neither of complainants nor any of them have any interest in the subject-matter of the suit, nor any title to institute a suit concerning it.

4th. That the said bill is multifarious in that these defendants are improperly joined with the above named their co-defendants, because their interests are distinct.

5th. That the matters and things set forth in the bill as grounds
24 for relief were had, done, and transpired before the commencement of this suit more than five years from the alleged date of the patent, to wit, May 9th, 1866.

6th. That the said complainants have not by their said bill made such a case by the matters set forth therein, or any of them, as to entitle them or either of them, in a court of equity, to any relief.

Wherefore and for divers of other good causes of demurrer appearing in the said bill, do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to make any other or further answer to said bill, and that they be dismissed hence with their costs in this behalf sustained.

(S'd) W. W. PAGE,
GEO. W. YOCUM,
Counsel for Edwin Russell and Margaretta V. Russell, Defendants.

DISTRICT OF OREGON:

We, the undersigned, certify that we have examined the foregoing demurrer, and that in our opinion it is well founded in law.

(S'd) W. W. PAGE,
GEO. W. YOCUM,
Counsel for E. & M. V. Russell, Def'ts.

25 UNITED STATES OF AMERICA,
District of Oregon:

I, Edwin Russell, being sworn, say that I am one of the defendants in the above entitled suits, and that the foregoing demurrer is not interposed for delay.

(S'd) EDWIN RUSSELL.

Subscribed and sworn to before me this October 18, 1875.

(S'd) RALPH WILCOX, *Clerk.*

(Endorsed:) Filed October 18, 1875. (S'd) Ralph Wilcox, clerk.

26 LYDIA C. HALL ET AL. } In equity.
vs.
EDWIN RUSSELL ET AL. }

MONDAY, *November 8th, A. D.* 1875.

Now at this day comes the complainants in the above-entitled cause, by Mr. W. W. Chapman, of counsel, and the defendants, by Mr. W. W. Page and Mr. G. W. Yocum, of counsel. Thereupon it is ordered that the demurrer to the bill of complaint herein be set for hearing on Thursday next, at ten o'clock a. m.

27 LYDIA C. HALL ET AL. } In equity.
vs.
EDWIN RUSSELL ET AL. }

WEDNESDAY, *November 10th,* A. D. 1875.

Now, at this day, upon motion of Mr. W. W. Chapman, of counsel for complainants, it is ordered that they have leave to file an amendment to the bill of complaint herein.

28 In the circuit court of the United States for the district of Oregon. Equity.

LYDIA C. HALL ET AL }
v.
EDWIN RUSSELL ET AL. }

The complainants make the following amendment to the bill to correct a mistake:

On page 22.—At the end of the resident clause of the bill add the following after "Ohio," "except complainant, W. W. Chapman, who is a citizen and resident of the State of Oregon."

(Sd.) MASON & ATWATER,
Solicitors.

U. S. circuit court for Oregon, ss.

I, W. W. Chapman, being sworn, say that the foregoing amendment is true.

(Sd.) W. W. CHAPMAN.

Subscribed and sworn to before me on the 10th of November, 1875.

(Sd.) RALPH WILCOX, *Clerk.*

(Endorsed:) Filed November 10, 1875. (Sd.) Ralph Wilcox, clerk.

29 *Demurrer to the bill of complainants.*

In the circuit court of the United States for the district of Oregon.

LYDIA C. HALL, CARRIE R. HALL, ALICE HALL, Jane R. Hall, James P. Hall, Anna E. Hall, Anna E. Coolige & Timothy W. Coolige, & W. W. Chapman, administrator, with the will annexed, of James L. Loring, deceased, complainants,
vs.
EDWIN RUSSELL, MARGARETTA V. RUSSELL, W. W. Page & Albina V. Page, his wife, & George H. Williams, defendants.

The defendant, George H. Williams, by protestation, not confessing all or any of the matters or things in said complainants' bill to be true, in such manner or form as therein set forth and alleged, does demur to the said bill, & for causes of demurrer assigns—

1st. That there is a misjoinder of parties plaintiff.

2d. That the said W. W. Chapman nowhere shows that he has any right to maintain any suit against these defendants.

3rd. That the said bill is multifarious, in that these defendants are improperly joined with the above-named codefendants, because their interests are distinct.

4th. That the said complainants have not, by their said bill, made such a bill as entitles them, or either of them, in a court of
30 equity, to any discovery from these defendants, or either of them, or any relief against them, or either of them, as to the matters contained in the said bill, or any such matters; and that any discovery which can be made by these defendants, or any of them, touching the matters complained of in the said bill, or any of them, cannot be of any avail to the complainants, or either of them, concerning any such matters, nor entitle the complainants to any relief touching the matters complained of.

5th. That neither of the complainants, nor any of them, have any interest in the subject matter of the suit, nor any title to institute a suit concerning it.

6th. That the matter and things set forth in the bill as grounds for relief were had, done, & transpired before the commencement of this suit more than five years from the alleged date of the patent, to wit, May 9th, 1866. Wherefore, and for divers *of* other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether this defendant shall be compelled to make any other or further answer to said bill, and that they be dismissed hence with his costs in this behalf sustained.

(Sd.) W. W. PAGE,
GEO. W. YOCUM,
Counsel for Geo. H. Williams, Def't.

31 DISTRICT OF OREGON:

We, the undersigned, counsel for the defendant in the foregoing demurrer, certify that we have carefully examined the same, & that it is our opinion founded in law.

(S'd) W. W. PAGE,
GEO. W. YOCUM,
Counsel for Geo. H. Williams, Defendant.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, W. W. Page, being first duly sworn, say that I am one of counsel for defendant Geo. H. Williams, in the foregoing entitled suit, and that said Geo. H. Williams is not in the district of Oregon nor within Multnomah County, & that the said demurrer is not interposed for delay.

(S'd) W. W. PAGE.

Subscribed and sworn to before me this 11th day of October, 1875.

(S'd) RALPH WILCOX, *Clerk.*

(Endorsed:) Filed November 11, 1875. (S'd) Ralph Wilcox, clerk.

32 In the circuit court of the United States for the district of Oregon. In equity.

LYDIA C. HALL ET AL.)
v.)
EDWIN RUSSELL ET AL.)

And now comes the complainants, and, by leave of the court, makes the following amendment to the bill: On page 21, line 15, after the word "therefore," insert as follows: "Complainants further represent that as they are informed and believe, and so charge, besides the estate of the said James L. Loring in the lands described in the bill, the said Loring did not leave sufficient personal or real property after satisfying his funeral expenses to pay all his just debts and expense of administration, nor any assets, real or personal, out of which to pay the legatees, or either of them, in said will mentioned.

(S'd) MASON & ATWATER, *Solicitor'.*

33 Circuit court of the United States, district of Oregon.

I, W. W. Chapman, being duly sworn, say that the statements in the foregoing amendment are true as I verily believe.

(S'd) W. W. CHAPMAN.

Subscribed and sworn to before me this 11th day of November, 1875.

(S'd) RALPH WILCOX, *Clerk.*

(Endorsed:) Filed November 11th, 1875. (S'd) Ralph Wilcox, clerk.

34 LYDIA C. HALL ET AL.)
vs.) In equity.
EDWIN RUSSELL ET AL.)

THURSDAY, *November Eleventh, A. D.* 1875.

Now, at this day, comes the complainants in the above-entitled cause by Mr. W. W. Chapman, their solicitor, and Mr. J. G. Chapman, of counsel, and the defendants, Edwin Russell and Margaret V. Russell, and W. W. Page and Albina V. Page, by Mr. W. W. Page and Mr. G. W. Yocum, their solicitors; and thereupon comes the defendant George H. Williams, by Messrs. Page and Yocum, his solicitors, and by leave of the court files his demurrer to the bill of complaint herein; and the court having heard the argument of counsel upon the several demurrers to the bill, and having given leave to complainants to file an amendment to the said bill, will advise thereof.

35 LYDIA C. HALL, WIDOW OF SAMUEL Parker Hall, deceased, and Carrie R. Hall, Alice Hall, Jane R. Hall, James P. Hall, Anna C. Coolige, formerly Anna C. Hall, and Timothy W. Coolige, her husband, heirs at law of the said Samuel Parker Hall, deceased, devisee of James L. Loring, deceased, W. W. Chapman, administrator with the will annexed of James L. Loring, deceased,
vs.
EDWIN RUSSELL AND MARGARET V. RUSSELL, his wife, W. W. Page and Albina V. Page, his wife, and George H. Williams. } In equity.

Now, at this day, comes the complainants in the above-entitled cause, by Mr. W. W. Chapman, of counsel, and the said defendants, by Messrs. Page & Yocum, of counsel, and the court having sufficiently advised in the premises upon the demurrers to the complaint herein, it is ordered and adjudged that the demurrers be, and the same is hereby, sustained, and that the bill of complaint herein be and the same is, dismissed.

36 In the circuit court of the United States for the district of Oregon.

LYDIA C. HALL, WIDOW, AND JANE R. HALL, Alice C. Hall, Carrie R. Hall, James P. Hall, Timothy W. Coolige and Anna C. Coolige, his wife, formerly Anna C. Hall, heirs at law of James L. Loring, deceased, and W. W. Chapman, administrator with the will annexed of the said James L. Loring, deceased, complainants,
vs.
EDWIN RUSSELL AND MARGARET V. RUSSELL, his wife, W. W. Page and Albina V. Page, his wife, and George H Williams, respondents. } In equity.

Decree rendered on the 12th day of November, 1875, dismissing complainants' bill.
Appeal allowed on the 22nd day of November, 1875.

37 Know all men by these presents that we, W. W. Chapman and Augustus C. Kinney, are held and firmly bound unto the above-named respondents, Edwin Russell, Margaret V. Russell, W. W. Page, Albina Page, and George H. Williams, in the sum of five hundred dollars, lawful money of the United States, for the payment whereof we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 22 day of November, 1875.

The condition of the above obligation is such that whereas the above-named Lydia C. Hall, Carrie R. Hall, Alice C. Hall, Jane R. Hall, James P. Hall, Timothy W. Coolige, Anna C. Coolige, and W. W. Chapman have prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the said circuit court of the United States for the district of Oregon:

Now, therefore, if the above-named appellants shall prosecute
38 their said appeal with effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'd) W. W. CHAPMAN. [SEAL.]
(S'd) AUG. C. KINNEY. [SEAL.]

Signed, sealed, and delivered in presence of—
(S'd) J. E. ATWATER.
(S'd) J. G. CHAPMAN.

(Endorsed:) Approved. (S'd) Matthew P. Deady, U.S. district judge, Oregon. Filed November 22nd, A. D. 1875. (S'd) Ralph Wilcox, clerk.

39 DISTRICT OF OREGON, *ss:*

I hereby certify that on the 15th day of July, 1876, in Multnomah County, in my district, I served the within writ of citation on Edwin Russell and Marg'retta V. Russell, his wife, and W. W. Page and Albina V. Page, his wife, by exhibiting to each of the original and at the same time delivering to each of them a true copy of the same.

Dated this 15th day of July, A. D. 1876.

ABNER W. WATERS,
U. S. Marshal,
By C. E. BURNS,
Sp'l Deputy.

The above return and statement subscribed and sworn to before me, the undersigned, this 17th July, 1876.

RALPH WILCOX,
Clerk U. S. Circuit Court, Oregon.

40 DISTRICT OF OREGON, *sst:*

I hereby certify that on the 28th day of July, A. D. 1876, in Multnomah County, in said district, I served the within writ of citation upon George H. Williams by exhibiting to W. W. Page, attorney and solicitor of the said Williams, the *the* original citation, and at the same time delivering to the said Page, as counsel for said Williams, a true copy of the same. Dated this 28 day of July, A. D. 1876.

ABNER W. WATERS,
U. S. Marshal,
By W. P. BURNS, *Deputy.*

Subscribed and sworn to before me July 29th, 1876.

RALPH WILCOX, *Clerk.*

41 UNITED STATES OF AMERICA, *sst:*

To Edwin Russell and Marg'retta V. Russell, his wife, W. W. Page and Albina V. Page, his wife, and George H. Williams, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to an appeal this day prayed for and allowed by the Hon. M. P. Deady, district judge for the district of Oregon, wherein Lydia C. Hall, widow, and Carrie R. Hall, Alice C. Hall, Jane R. Hall, James P. Hall, Timothy W. Coolige and Anna C. Cool-

ige, his wife, formerly Anna C. Hall, heirs at law of Samuel Parker Hall, deceased, and W. W. Chapman administrator with the will annexed of James L. Loring, deceased, are appellants, and you are appellees, to show cause, if any there be, why the decree in the said suit should not be corrected and speedy justice should not be done to the parties in that behalf.

42 Witness the honorable M. P. Deady, district judge for the district of Oregon.

November 22, 1875.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Indorsed:) U. S. circuit court, district of Oregon. No. 244. Lydia C. Hall et al., appellants, vs. Edwin Russell et al. appellees. Original citation returned and filed July 29, 1876. Ralph Wilcox, clerk.

43 UNITED STATES OF AMERICA,
District of Oregon, ss:

I, Ralph Wilcox, clerk of the circuit court of the United States for the district of Oregon, in the ninth circuit, do hereby certify that the foregoing pages contain a true and complete transcript of the record and proceedings had in said court in the case of Lydia C. Hall et al. against Edwin Russell et al., as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Portland, in the district of Oregon, in the ninth circuit, this 30th day of September, A. D. 1876.

[SEAL.] RALPH WILCOX,
Clerk.

(Indorsed:) U. S. circuit court, Oregon. Lydia C. Hall et al. vs. Edwin Russell et al. Transcript.

(Indorsement on cover:) No. 283. Lydia C. Hall, widow, and Carrie R. Hall, Alice C. Hall, Jane R. Hall, James P. Hall, Timothy W. Coolidge & Anna C. Coolidge, heirs at law of Samuel Parker Hall, dec'd, devisee of J. S. Loring, dec'd, and W. W. Chapman, adm'r of said J. S. Loring, deceased, appellants, vs. Edwin Russell and Margaretta V. Russell, his wife, W. W. Page and Albina V. Page, his wife, and George H. Williams. Oregon C. C. U. S. Filed 20th October, 1876.

Supreme Court of the United States.

OCTOBER TERM, 1879.

LYDIA C. HALL, et al., *Appellants.*

63. *vs.*

EDWIN RUSSELL, et al., *Appellees.*

Appeal from the Circuit Court of the United States for the District of Oregon.

W. W. CHAPMAN,
T. D. LINCOLN,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1879.

LYDIA C. HALL, et al.,

Appellants.

63. *vs.*

EDWIN RUSSELL, et al.,

Appellees.

Appeal from the Circuit Court of the United States for the District of Oregon.

I.

The Appellants were the devisees of James L. Loring, and W. W. Chapman his administrator. They set up in their bill that James L. Loring, on or about the 1st of April, 1852, settled upon the land in controversy, under the Donation Act of the United States of September 27th, 1850; that, on the 20th of April, 1852, he filed his notification and first proof under the 6th section of the act; that he continued to reside on the land and comply with all the laws of the act, till his death on the 23d of January, 1853; that afterwards the appellant, W. W. Chapman, as Loring's administrator, made the final proof of Loring's continued occupation on the land and compliance with the statute, and of his death on or about the

day aforesaid. The appellants claimed that the United States were bound to issue a patent to the heirs at law of Loring, and that the will of Loring, devising all his property to the appellants, entitled them to the same.

The bill sets out that the Surveyor-General, to whose determination all preliminary questions of title are referred by the statute, together with the Register, Receiver and Commissioner of the Land Office, had issued a certificate for a patent to the heirs at law of Loring; but that the same, for some unknown cause, was set aside by the Acting Secretary of the Interior, and a patent was issued to the heirs of Joshua and Sarah Delay, who had, after the death of Loring, set up a claim of occupancy of the land, dating the commencement of their occupancy from the 24th of August, 1853, some seven months after Loring's death.

The bill alleges that the Delays were brought on the lands by Loring as his tenant or cropper, and so remained until his death, and that afterwards they falsely and fraudulently set up a claim to the lands, and pretended to the officers of the United States Government, having the same in charge, that Loring never did settle upon or occupy the said lands, and that this claim was false and fraudulent as against the appellants.

The bill sets up a recovery, by Chapman, against the Delays and Stout, who had obtained a part of their pretended interest, with notice of appellants' claim.

The bill sets up that the heirs at law of Loring brought a suit against the appellees in this court as assignees of the Delays, and that they pleaded, as a bar thereto, that, by the will of James L. Loring, all the rights of the said heirs had been devised to, and are vested in, the devisees of Loring's appellants herein; that afterwards the appellees herein, Rus-

Objection to Jurisdiction

Jurisdiction is given to the Equity courts of the U S in all cases where the right grows out of the Constitution and laws of the United States without reference to Citizenship or residence

Constitution of the US

Judiciary act

Act of March 3 1875

18 Stat at Large 470

sell, Williams and Page, for a nominal price, and with notice of the rights of the appellants, had obtained the tra of such right, as the heirs of Loring had in the property.

The bill also sets up that Loring died leaving debts legacies, which his personal and other real property were sufficient to satisfy.

The defendants demur to the bill, and in and by demurrer they raise, beside some preliminary questions, a parties, plaintiffs and defendants, the questions:

1st. As to the right of the appellants, as devisees Loring, to the property as against the appellees, assignees the heirs at law of Loring: and 2nd. whether the suit not barred by the statute of limitation of Oregon, relatin proceedings in courts of Equity.

II.

THE NATURE OF THE ESTATE GRANTED BY THE STATUTE

The right of the devisees of Loring, as against his heirs at law claiming in their own right, presents the question whe the land in controversy, by virtue of the statute, passed to heirs at law of Loring by descent and as a part of his est or whether the same went directly to such heirs by purch and as a gift direct from the United States to them, irresp tive of the estate of Loring.

Upon this general question we make the following poi and refer to authorities thereunder:

FIRST.

The language of the act, and the technical terms u therein, show that it was the intention of Congress to give property to the heirs by descent and as a part of the settl

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sell, Williams and Page, for a nominal price, and with full notice of the rights of the appellants, had obtained the transfer of such right, as the heirs of Loring had in the property.

The bill also sets up that Loring died leaving debts and legacies, which his personal and other real property were not sufficient to satisfy.

The defendants demur to the bill, and in and by the demurrer they raise, beside some preliminary questions, as to parties, plaintiffs and defendants, the questions:

1st. As to the right of the appellants, as devisees of Loring, to the property as against the appellees, assignees of the heirs at law of Loring: and 2nd. whether the suit was not barred by the statute of limitation of Oregon, relating to proceedings in courts of Equity.

II.

THE NATURE OF THE ESTATE GRANTED BY THE STATUTE.

The right of the devisees of Loring, as against his heirs at law claiming in their own right, presents the question whether the land in controversy, by virtue of the statute, passed to the heirs at law of Loring by descent and as a part of his estate, or whether the same went directly to such heirs by purchase, and as a gift direct from the United States to them, irrespective of the estate of Loring.

Upon this general question we make the following points, and refer to authorities thereunder:

FIRST.

The language of the act, and the technical terms used therein, show that it was the intention of Congress to give the property to the heirs by descent and as a part of the settler's

It is objected that there was no Statute of descents in Oregon at the time of Lamys death.

If there was no law of descents, then all the claims of the defendants under the purchase from the heirs at law of Lamy Dalles to the ground

But there was a law of descents - See act of Provisional Government June 27 1844 adopting Iowa Code See laws from 43 to 49 page 100 - Iowa Laws of 1839 page 485

estate, and not to give it to them by purchase, as a direct gift, regardless of the estate of the ancestor.

Sec. 4 *of the Donation Law,* 9 Stat. at Large, 497.

Sec. 8 *of the Donation Law.* 9 Stat. at Large, 499.

The FOURTH section of the Donation Law among other things provides, that:

"The possessory right acquired by him under the provisions of this act shall DESCEND *to his heirs at law, or pass to his devisees.*"

This refers to the alien. Surely an alien, who has performed no previous service to this country, would not be preferred, in this respect, to the citizen settler.

This section also provides, that:

"The heirs of the deceased shall be entitled *to the share or interest of the deceased* in equal proportions, except where the *deceased shall otherwise dispose of it by testament duly and properly executed.*"

Here is the interest of the "*deceased*" spoken of as "*descending* to *the heirs*, and of its passing to the *devisee* by will. Death has not therefore cut off or destroyed this interest.

The EIGHTH section provides, that:

"All the *rights of the deceased* under this act shall *descend to the heirs at law of such settler.*"

Now, this is an express declaration that the *deceased settler had rights* in the land, and that they *descended* to his *heirs at law.*

It is only the *rights* of the *deceased* settler, under this act, that did descend to the heir. If death cut off these rights, then, under the statute, the heirs got nothing.

The reason of this provision in the eight section, was to have an express declaration that the non-performance of the

condition of four years occupancy, the same becoming impossible by death, did not cut off the estate or rights of the deceased settler.

The language of the fourth section of this act, is to be carefully observed in connection with the eighth. "There shall be, and hereby is, granted to every white settler or occupant of the public lands," etc.

It is to the "settler or occupant" to whom the land is granted, not to his heirs.

The eighth section of the act gives no new title, but provides simply, that "upon death of any settler, before the four years of continued possession required by this act, all *the rights of the deceased*, under this act, shall *descend* to the heirs at law of *such settler.*"

It is the rights of the settler, acquired under the fourth section of the act, that descend.

None other are referred to in this eighth section. In this *eighth* section, as well as in the *fourth*, there is a direct recognition that the deceased settler still had an interest left in the land which descended to his heirs.

These provisions can not be reconciled with the idea that the lands, upon the death of the settler, were given direct to the heirs, freed of all claims of the estate of the ancestor.

Why, the settler might have contracted debts for his comfort during his last sickness, or to improve the land with buildings, and who was to pay such debts or to bury him, if all interest in the property he had settled upon and improved, was to go to the heirs, freed of all claims of his creditors and devisees.

It is in consideration of the settlement upon, and occupancy of, the land by the settler, that it is granted, and in case of death, it goes to his heirs as other property does.

SECOND.

The considerations stated in the first point above, arise from the language and technical terms of the Donation Law. The authorities tend strongly in the same direction.

The estate granted is a present grant from the passage of the act, made certain and definite upon the specific land by the settlement thereon.

Schulenberg v. *Harriman*, 21 Wall., 60.
Wythe v. *Haskell*, 3 Sawy., 578.
Lee v. *Summers*, 2 Oregon, 267.
Blakesly v. *Caywood*, 4 Oregon, 284.
Dolph v. *Barney*, 5 Oregon, 202.
Adams v. *Burke*, 3 Sawy., 418.
Chapman v. *School District No.* 1, Deady, 113.

In *Schulenberg* v. *Harriman*, the court say:

"That the act of Congress of June 3d, 1856, passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant, and admits of no other meaning. The language of the first section is, that there shall be and hereby is granted," etc.—21 *Wall.*, 60.

The language of the 4th section of the Donation Law, is identical with the above. "*that there shall be, and hereby is granted*, to every white settler," etc.

This present estate, it will be observed, is given, by the fourth section of the act, to the *settler* and not to his heir.

THIRD.

The fact that the land is not ascertained or defined by the statute, does not prevent the statute from operating as a present grant.

Green v. *Rutherford's Heirs*, 2 Wheat., 196.
The United States v. *Arredondo*, 6 Pets., 745.
Lessieur v. *Price*, 12 How., 77.
Fremont v. *The United States*, 17 How., 558, 559.

FOURTH.

It is the Donation Act that passes the title and not the patent. The latter is but the evidence of the title and of the facts entitling the party to the specific land.

Adams v. *Burke*, 3 Sawy., 418, 419.
Wythe v. *Haskell*, 3 Sawy., 578.
Langdeau v. *Hanes*, 21 Wall., 530.
Barney v. *Dolph*, 7 Otto, 656.

In *Wythe* v. *Haskell*, the court say:

"The title to the settler, under the Donation Act, vested in him upon the passage of the act, or the making of his settlement, if the former was prior to the latter, subject to the performance of the conditions upon which the grant was made. (*Chapman* v. *School District*, 1 Deady, 113; *Fields* v. *Squires*, Id. 378; *Lamb* v. *Starr*, Id. 451, 452; *Lamb* v. *Davenport*, 1 Saw., 638; *Mizner* v. *Vaughn*, 2 Saw., 274; *Adams* v. *Burke*, *ante*, 415.) The patent did not pass the title to Willson and wife, but is only record evidence of their title, and of the facts out of which it arose."—3 Saw., 578.

FIFTH.

The cases show that the title conveyed by the act is a present fee simple, subject to be defeated by the non-performance of a condition subsequent.

Stark v. *Starr*, 4 Otto, 486.
Adams v. *Burke*, 3 Sawy., 418.
Wythe v. *Haskell*, 3 Sawy., 578.
McKay v. *Freeman*, 6 Oregon, 456.
Dolph v. *Barney*, 5 Oregon, 202.
Blakesly v. *Caywood*, 4 Oregon, 286.

MR. JUSTICE FIELD, in *Adams* v. *Burke*, thus states the law:

"Whereas, in the present case, there had been a previous settlement, the act of Congress vested the title in the settler immediately upon its passage. The act is a grant *in praesenti*; its language is that there "shall be and *hereby is* granted" to the settler or occupant, language which imports an immediate transfer of the interest of the grantor, not a promise to transfer that interest at a future period. But it is a grant subject to the conditions of continued residence and cultivation of four years from settlement; if those conditions had not already been performed on the passage of the act, they were to be performed subsequently. Until performed, the estate granted was defeasible; when performed, the estate became indefeasible." 3 *Sawyer*, 418.

SIXTH.

In the Government of Oregon, the people and the courts have regarded the settler's rights to the land as giving him a fee simple estate.

Dolph v. *Barney*, 5 Oregon, 202.
McKay v. *Freeman*, 6 Oregon, 456.
Adams v. *Burke*, 3 Sawy., 418.
Wythe v. *Haskell*, 3 Sawy., 578.
Barney v. *Dolph*, 7 Otto, 654.

In *Dolph* v. *Barney*, the Supreme Court of Oregon, says:

"When Congress grants lands in words of present grant, the legal title passes to the grantee. (13 *Pets.*, 499; 6 *Branch*, 128; 8 *Id*, 244; 2 *Wheat*, 198; 12 *Pets.*, 454.) The cases just cited, show that the title vests immediately in the donee, none the less because the title vests in him conditionally, and subject to be defeated by his failure to comply with the law; nor because the boundaries are yet to be determined." 5 *Oregon*, 202.

The above is quoted by the court from the opinion of the Supreme Court of Oregon, in the case of *Lee* v. *Summers*, 2 Oregon, 267.

Further on the court, in *Dolph* v. *Barney*, says:

"To the views of the character of the grant, as expressed in the opinions referred to, we yield our full assent, and hold the Donation Act to be a grant *in praesenti* of an estate in fee, subject to be defeated by non-compliance with the conditions subsequent therein expressed." 5 *Oregon*, 202.

In *McKay* v. *Freeman*, the Supreme Court of Oregon says:

"Is such a settler seized of an estate of inheritance? Section 329 of the code of civil procedure, contains a legislative construction of the Donation Law, which is, we think, applicable to the case. It provides that, in an action at law for the recovery of possession of real property, if either party claims the property as the donee of the United States, under the Donation Law or its amendments, such party, from the date of his settlement thereon, as provided in said act, 'shall be deemed to have a legal estate in fee in such property, to continue upon condition that he performs the conditions required by such act, which estate is unconditional and indefeasible after the performance of such conditions.'"

"This legislative construction is binding on this court, unless it has been over-ruled by the courts of the United States. It has not only not been over-ruled, but has been uniformly adopted by these courts whenever the question has been before them. (*Chapman* v. *School District No.* 1, 1 Deady, 113; *Adams* v. *Burke*, 3 Saw., 416; *Lamb* v. *Davenport*, 1 Id., 632;) An estate in fee, being necessarily an estate of inheritance, we are of the opinion that the widow, in this case, was entitled to her dower by express provisions of the statute of this state." 6 *Oregon*, 456, 457.

SEVENTH.

The decisions of this court tend very strongly in the same direction.

Barney v. *Dolph*, 7 Otto, 654.
Stark v. *Starr*, 4 Otto, 486, 7, 8.
Same v. *Same*, 6 Wall., 417.
Lamb v. *Davenport*, 18 Wall., 317.

In *Barney* v. *Dolph*, in giving the opinion of the court, speaking of the action of the people of Oregon, MR. CH. J. WAITE, says:

"As part of their plan of Government, they established a 'land law,' by which free males, over the age of eighteen years, were permitted to occupy and hold six hundred and forty acres of land; and regulations were adopted for designating claims and protecting the occupants in their possession. While not denying to the United States the ownership of the soil, the occupants, *to all intents and purposes, used and dealt with the land they severally claimed as their own.*"—7 *Otto*, 654.

In the case of *Stark* v. *Starr*, MR. JUSTICE FIELD, speaking for the court, says:

"The Pre-emption Law had not been extended over the country, nor, until the passage of the act of September 27th, 1850, usually designated as the Donation Act, was there any known mode for obtaining the legal title, and yet the inhabitants dealt in the land as though possessed of the fee. They not only occupied, cultivated and improved such portions as their necessities required, but they bought and sold it as land is bought and sold where the title has passed out of the Government. This dealing in land, without having the title, arose necessarily from the settlement of the country before the laws of the United States were extended over it. Indeed, a large number of emigrants from the United States had settled in the country whilst its sovereignty was in dispute with Great

Britain. It was not until the 15th of June, 1846, that its sovereignty was determined by the treaty; and previous to this time (in 1845), the emigrants had formed for themselves a provisional government, under which laws were passed, protection to persons and property secured, and justice administered with all the order and regularity of long established communities. The inhabitants engaged in the pursuits, industries and enterprises which might be expected from an active, intelligent and moral people. For the preservation of order and security, they were obliged to make some regulations for the possession and occupation of land among themselves. They accordingly established a land system, providing in what name and to what extent land should be taken up and possessed. Under it, each person over a specified age, upon complying with certain conditions, was allowed to hold six hundred and forty acres. He was required to designate the extent of his claim, either by natural or artificial boundaries; make, within prescribed periods, improvements thereon; and have the claim recorded in the office of the Territorial Recorder, in a book kept for that purpose. All claims thus taken up and recorded were respected by the people; and the claimant was protected not only by the law of the provisional government, but by the general public sentiment of the country in their possession and enjoyment. They were at liberty to use the claims for any legitimate purpose, as absolute owners, either for cultivation and residence, or as sites for villages and towns. They did not deny, in any of their dealings, the proprietorship of the United States, but they acted upon a confident expectation that their possessions and improvements would be respected by the Government, and that ultimately they should acquire the title. The expectations were founded upon the uniform action of the Government in its dealings with the public domain, occupied by settlers in advance of legislation for its sale. It was, therefore, understood by the people that, whenever the legal title was thus obtained, it should enure to the benefit of the grantees of the claimant who secured the patent of the United States. This understanding constituted, in reality, the unwritten conventional law of the state, which affected all

transactions in land, until the passage of the Donation Act. This act shows that Congress, in its passage, was cognizant of the fact; for it implicitly recognizes the validity of previous contracts for the transfer of land made by a claimant, to whom, upon proof of his settlement and its continuation for four years, a patent should be afterwards issued."—4 *Otto*, 486–7–8.

EIGHTH.

The land law of the Provisional Government, and the various acts of Congress, relating to the public lands, are to the same effect, and show that the title of the settler passed to the heirs at law by descent, and not by purchase.

Land Law, Session Act Sept. 12, 1849, p.

The Ordinance of 1787, *for the Government of the N. W. T.*

The Pre-emption Act of 1841, 5 Stat. at L. 456, 457.

The Act of May, 1836, *providing for the issuing of patents to the heirs of deceased persons*, 5 Stat. at L., 31.

The Act of the Territorial Legislature, Sept. 12, 1849.

The Act to establish the Territory of Oregon, 9 Stat. at L., 323, Sec. 1.

Act of Congress for settling land claims in Missouri, 2 Stat. at L., 749, 750.

Opinion of Atty.-Gen. Bates, 11 Opinions Atty.-Gen., 49.

NINTH.

The 14th section of the act for the organization of Oregon Territory, made void all grants of land, and provided, that all subsequent law of the Legislature should be referred to Congress, and if Congress disapproved of them, that they should be void. Believing that the clause, in relation to the grants of land, did not refer to the right and claim of the settler under the land law of the Provisional Government, the Territorial

Legislature re enacted the same. This law was referred to Congress and was not disapproved. On the contrary, in the Donation Act in question, Congress adopted the occupancy and possession created by this law, and engrafted the fee upon it.

Session Laws of Oregon, Sept. 12, 1849.
Act Organizing the Territory of Oregon, 9 Stat., at L., 329.
Donation Act of Congress, 9 Stat., 498.

TENTH.

The estate in Loring was a fee simple, subject to a condition subsequent, that might defeat or cut it off, if the occupancy was abandoned before the four years had run out, or if the other conditions of the statute were not complied with for the four years, or up to the time of the death of Loring.

The United States v. *Arredondo*, 6 Pets., 745, 746.
Adams v. *Burke*, 3 Sawy., 418.
Wythe v. *Haskell*, 3 Sawy., 578.
Stark v. *Starr*, 4 Otto, 487.
Crews v. *Burcham*, 1 Black., 356, 357.
Chapman v. *School District No.* 1, Deady, 113.

ELEVENTH.

Loring having fulfilled all the conditions of the statute up to his death, and the further performance becoming impossible by the act of God, the condition subsequent, by the 8th section of the act and by the common law, becomes fulfilled, and the estate is released from its operation and thereby becomes absolute.

United States v. *Arredondo*, 6 Pets., 745, 746.
2 *Black. Com.*, 156, 157.
4 *Kent.*, 129, 130.

The consideration for the title and interest in the land, moved wholly from the deceased settler, and the title therefor belongs to his estate, and by the fourth section of the Donation Act, is given directly to him, not to his heirs.

TWELFTH.

Loring having an estate of inheritance, which descended to his heirs, he had a devisable estate.

Blakesley v. *Caywood*, 4 Oregon, 286.
Jarman on Wills, 40, 178.
Redfield on Wills, 390, Sec. 17.
Act of Oregon of 1849, *relating to Wills.*
The 4th section of the Donation Act, 9 Stat. at L., 498.
4 *Kent*, 513.
1 *Washburn on Real Property*, 79.
Bond v. *Swearingen*, 1 Ohio, 395.
Fields v. *Squires*, Deady R., 383.
Stephenson v. *Hagan*, 15 B. Mun., 282, 315.

THIRTEENTH.

The Statute of Oregon relating to wills, is broad enough to cover the interest of the settler dying before the four years had expired. It reads:

"That every person twenty years of age and upwards, of sound mind, may, by last will, devise all his estate, real personal and mixed, and all interest therein, leaving to the widow her dower.—*Deady's Code.*

FOURTEENTH.

The contract clause in the 4th section of the Donation Act, like similar clauses in other acts, was intended to protect the United States from speculating and fraudulent claims, and

the settler from imposition, but was not intended to prevent the full use and enjoyment of the property, nor to prevent the settler from transferring it by will.

Barney v. *Dolph*, 7 Otto, 657.

Myers v. *Croft*, 13 Wall., 296, 597.

Lamb v. *Davenport*, 18 Wall., 314, 315.

Fourth section of the Donation Law, 9 Stat at L., 498.

In *Lamb* v. *Davenport*, the court, speaking by MR. JUSTICE MILLER, say:

"But we hold that as to a portion of the land which was allotted to him by the Surveyor-General, and the title to which vest in his heirs by the act of 1836, without which the patent would be void, his contract of sale, made before the Donation Act was passed, and while he was the owner of the possessory interest before described, was a valid contract, intentionally protected by the Donation Act itself, *and binding on the title which comes to the heirs, by reason of his death.*"—18 *Wall.*, 317.

The action of the people of Oregon from its first settlement; the action of their Provisional Government and of their Territorial Legislature, relating to land; the decision of their courts all treated the title of the settler as a fee simple—as an estate of inheritance. This action was recognized and confirmed by the Donation Act. Language and legal terms were used therein, and provision was made to secure to the settler this estate of inheritance, and to provide that it should not be cut off and destroyed by his death, prior to the completion of the four years occupation, but should "descend to his heirs" upon his death. The heir was not bound to complete the four years occupation, but upon proof that the settler had occupied and complied with the statute up to the time of his death, this passed the land to the heir by descent. It was an estate of inheritance, released by the death of the settler from the

condition subsequent, and passed directly by "descent" to his heirs at law, without further consideration from the latter. His widow was dowable of it as an estate of inheritance. The creditors of his last sickness, and those whose money may have gone to improve it, had that interest in it that they could have in other property. Was it not liable to the expenses of his last sickness and burial? And could he not devise it away?

All the benefits that were intended to accrue to *him* from *his* settlement, occupancy and compliance with the act, might be otherwise lost.

Unless there be some clear and distinct provisions of law, making a distinction between this estate, and other estates of inheritance, then it was subject to his power by devise.

And it is submitted that the decision of this Court, upon the Donation Act, tend strongly to place the land in the settler as an estate of inheritance, which descends to the heirs as such, and that his title is one by descent and not by purchase.

III.

THE STATUTE OF LIMITATIONS.

FIRST.

The statute of limitations of the State of Oregon in question, is an act relating to the practice in equity, and does not apply to the action of ejectment or to any other suit at law affecting the title. While, by the laws of Oregon, the action of ejectment was barred by twenty years, this statute limited the right to five years after the date of the patent, or to one year from the passage of the act.

Laws of Oregon of 1874, *p.* 106, *pp.* 189, 190.

This act purports to be an act to regulate suits in equity, and must be confined to proceedings in the state court.

SECOND.

If applied to equity proceedings in the courts of the United States, it is in direct opposition to the laws of the United States, and to the long and well settled practice of this Court.

The act of 1792, *2nd Sec.*, 1 Stat. at L., 276.
Rules of the Supreme Court of 1792, 2 Dallas, 413, 414.
Sec. 913 *of the Rev. Stat. of the U. S.*, 174.
Michoud v. *Girod*, 4 How., 560, 561.
Prevost v. *Gratz*, 6 Wheat., 497, 498.
Hall v. *Russell*, 3 Saw., 515, 516.
Rhode Island v. *Massachusetts*, 15 Pets., 272, 273.
U. S. Bank v. *Halstead*, 10 Wheat., 54, 55.
Stearns v. *Page*, 7 How., 828, 829.
Boyle v. *Zacharie*, 6 Pets., 658.
Elmendorf v. *Taylor*, 10 Wheat., 168, 173.
Thomas v. *Harvie's Heirs*, 10 Wheat., 149.
Neves, et al. v. *Scott, et al.*, 13 How., 272.

In *Hall* v. *Russell, et al.*, (this case) the Circuit Court says:

"But the limitation here invoked as a bar to this suit, is no part of the laws of the United States. By its terms, it only applies to suits in equity in the courts of the state. Therefore it does not come within the purview of section 721 *supra*, nor become in any sense the law of this forum. It is a singular case. Our attention has not been called to another like it, or to any authority directly bearing upon it."

"An action at law to recover possession of this property, would not be barred by the laws of this state under twenty years. Whether the court shall follow that statute or the

limitation of five years contained in section 378, *supra*, is the question. It is conceded that in a case of equitable cognizance like this, the court is not bound by the statute of limitations, but may, for good reason, apply a longer or a shorter time in bar of a suit." 3 *Saw.*, 515, 516.

In *Michoud v. Girod*, this Court say:

"Generally speaking, when a party has been guilty of such laches in prosecuting his equitable title as would bar him, if his title were solely at law, he will be barred in equity, from a wise consideration of the paramount importance of quieting men's titles, and upon the principle that *expedit reipublicae ut sit finis litium;* although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them, or at least generally take the same limitations for their guide, in cases analogous to those in which the statutes apply at law." 4 *Howard*, 561.

THIRD.

The 34th section of the Judiciary Act (*Sec. 721 of the Rev. Stat. U. S.*) does not apply to cases in Equity.

United States v. *Reid et al.*, 12 How., 363.

Fenn v. *Holme*, 21 How., 484, 485.

FOURTH.

In Equity the courts of the United States apply the limitation provided for cases at law, by analogy to like cases, in other words, to the limitation in ejectment.

Coulson v. *Walton*, 9 Pets., 82.

Rhode Island v. *Massachusetts*, 15 Pets., 272, 273.

Michoud v. *Gerod*, 4 How., 560, 561.

FIFTH.

The equity practice and modes of proceeding are not in any way governed by state laws or state practice, but

by the Statutes of the United States, and the principles, rules and usages of Courts of Equity in this country and in England.

Robinson v. *Campbell*, 3 Wheat, 221, 222.
United States v. *Howland*, 4 Wheat, 115.
Neves et al. v. *Scott et al.*, 13 How., 272.
Noonan v. *Lee*, 2 Black, 509.
Payne v. *Hook*, 7 Wall., 429, 430.
Broderick's Will, 21 Wall., 520.

SIXTH.

In suits in Equity, in relation to titles to land, the limitation ordinarily applied to an action in ejectment, is the established rule followed by the United States Courts.

Rhode Island v. *Massachusetts*, 15 Pets., 272, 273.
Piatt v. *Vattier*, 9 Pets., 415, 416, 417.
Bowman v. *Wathen*, 1 How., 194.
Hughes v. *Edwards*, 9 Wheat., 497.
Prevost v. *Gratz*, 6 Wheat., 504.
Kane v. *Bloodgood*, 7 Johns Ch. R., 113,

In the case of *Hughes* v. *Edwards*, the court say:

"In the case of a mortgagor coming to redeem, that court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff, after twenty years adverse possession, fixed upon that as the period, after forfeiture and possession taken by the mortgagee, no interest having been paid in the meantime, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favoured. 9 *Wheat*, 497.

In *Kane* v. *Bloodgood*, CHANCELLOR KENT says:

"In *Pearson* v. *Pulley*, (1 Ch. Cas., 102, 20 Car., II) the Lord Keeper said he considered twenty years to be a fit time

within which a mortgage was to be redeemable, in imitation of the statutes of limitations in real actions. So early were the statutes of limitations admitted to be the rule of decisions in Equity as well as at law; and though the courts of Equity were not within the words of the statutes, the time presented by them was adopted by analogy, as a fit and just period for a bar in Equity of analogous claims."—7 *Johns*, Ch. R., 113.

SEVENTH.

This suit relates to the primary disposal of the soil of the United States. That was placed entirely beyond the interference of the states, by acts of Congress relating to Oregon; and among others, by the 4th section of the ordinance of July, 1787, which was adopted in the act organizing the Territory of Oregon, and into the act admitting Oregon into the Union.

The Ordinance of July, 1787, 1 Chase's Stat., 69.
The Act organizing the Territory of Oregon, 9 Stat. at L., 329
The Act admitting Oregon, 11 Stat. at L., 384.

EIGHTH.

The right claimed in this suit is founded upon a statute of the United States in relation to this primary disposal of the soil, and no state law can in any way interfere with, affect, or cut off that right. It can not limit or prescribe for it unusual and short limitations not known to its laws or the proceedings of its courts.

Gibson v. *Chouteau*, 13 Wall., 99, 100.

"Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarass its exercise." 13 *Wall.*, 99.

This is true of all rights placed exclusively under the power and jurisdiction of the United States—such as the right to the public lands, given by a statute of the United States, copyrights and patent rights. As to the latter, it has been held that no state limitation could affect or bar them.

Collins v. *Peebles*, 2 Fish, 543.
Parker v. *Hallock*, 2 Fish, 543. *n.*
Read v. *Miller*, 3 Fish, 314.
Wood v. *Cleveland Rolling Mill Co.*, 4 Fish, 556.
Anthony v. *Carroll*, 9 Official Gazette, 200.

In *Collins* v. *Peebles*, MR. JUSTICE SWAYNE held:

"That the state statutes could not limit the time within which actions for the infringement of letters patent might be brought in the courts of the United States; that Congress having failed to legislate on the subject, there was no limit to the time for bringing such actions, and the demurrer must be sustained." 2 *Fisher*, 543.

For a similar opinion of this learned judge, see *Wood* v. *Cleveland Rolling Mill Co.*, 4 Fisher, 556.

In *Parker* v. *Hallock*, the reporter says:

"In this case the defendant's counsel insisted that the plaintiff was barred by the statute of limitations; but Judge Grier held that as no act of Congress had been passed to meet the case, and the law of Pennsylvania did not apply to it, there was no statute limiting the time in which a suit might be brought for an infringement of a patent right. 2 *Fisher*, 543.

NINTH.

What estate was given to Loring by the Donation Act; what was in him at the time of his death; what right his heirs obtained at his death and in consequence thereof, and of his occupation of the land and compliance with the act up

to that time, and whether they obtained these rights as a part of his estate; whether the estate was one of inheritance, and the heirs took by descent or by purchase;—all these are questions depending solely upon the Donation Act; and we insist that the limitation clause of the Oregon Act, relating to the practice of its courts in Equity, cannot be applied to this case as a law binding the court, or as a guide to the court, in place of the rule heretofore adopted by the courts of the United States in equity causes.

All of which is respectfully submitted.

W. W. CHAPMAN,
T. D. LINCOLN,
Counsel for Appellants.

Wrong

Supreme Court of the United States.

OCTOBER TERM, 1879.

LYDIA C. HALL, et al., *Appellants.*

63. *vs.*

EDWIN RUSSELL, et al., *Appellees.*

IN EQUITY.

Appeal from the Circuit Court of the United States for the District of Oregon.

Oregon Donation Law of the 27th September, 1850.
Estates in fee simple, conditional and absolute.
Grants with condition subsequent.
Descent and devise.
Ordinance of 1787, respecting the Public Lands.
Power of Congress and Jurisdiction of United States Courts respecting the regularity in issuing, and validity of Patents, exclusive.
State Statutes of limitations in Equity, how far binding, or a guide to United States Courts of Equity.

Argument of W. W. CHAPMAN, *for Appellants.*

Supreme Court of the United States.

OCTOBER TERM, 1879.

LYDIA C. HALL, widow, and CARRIE R. HALL, JANE R. HALL, ALICE HALL, JAMES P. HALL, ANNA C. COOLIGE and T. W. COOLIGE, her husband, heirs at law of JAMES P. HALL, who was devisee of JAMES L. LORING, and W. W. CHAPMAN, Administrator, with the will annexed of the said JAMES L. LORING, deceased.

Appellants.

vs.

No. 63.

EDWIN RUSSEL and MARGARET V. RUSSEL, his wife, W. W. PAGE and ALBINA V. PAGE, his wife, and GEO. H. WILLIAMS,

Appellees.

IN EQUITY.

Appeal from the Circuit Court of the United States for the District of Oregon.

STATEMENT OF FACTS.

On the 2d day of October, 1875, the complainants filed their bill in the Circuit Court of the United States, for the District of Oregon, against the appellees, setting forth, substantially, that, on the 20th day of June, 1849, at Cincinnati, in the state of Ohio, James L. Loring, late of Clackamas

county, Oregon, made his last will and testament, by which, among other things, he provided for the payment of his funeral expenses and just debts; for the payment of $2.000 to Thomas Wheeler; $500 to the Orphans' Asylum of Cincinnati, (kept by Protestant ladies,) and all the rest of his estate, of which he should die seized and possessed, or to which he should be entitled at the time of his death, to SAMUEL PARKER HALL, who was designated as sole executor of the said last will and testament.

That, since the death of said Loring, which occurred in January, 1853, and before the 20th of June, 1870, the said Hall died intestate, without having qualified as executor, leaving, as his widow, the said Lydia C. Hall, and as his heirs at law, the said Carrie, Alice, Jane, James and Anna.

On the 20th of June, 1870, the said will was duly admitted to Probate in the County Court of Clackamas county aforesaid.

The bill states that the said Loring was in debt, and that, besides the estate in the lands in the bill mentioned, hereafter referred to, the said Loring did not leave sufficient personal or real property, after satisfying his funeral expenses, to pay his just debts and expense of administration, nor any assets, real or personal, out of which to pay the legacies, or either of them.

That, in April, 1852, the said Loring, being a single man, conformable to the provisions of an act of Congress of the 27th September, 1850, known as the Oregon Donation Law, (9 Statute at Large, 496) settled upon a certain tract of the public lands, situate near the city of Portland in the state of Oregon, containing 303 acres, particularly described in the bill, and continued to reside upon, and cultivate the same, until his death in January, 1853, having up to the time of his death complied with all the requirements of the said Donation Law.

It is further alleged in the bill, that a few months previous to his death, Loring, who was a single man, built a house and barn upon the land in question, and furnished all the facilities for carrying them on, and stocked the farm with cattle, obtained tools and farming implements and provisions, and all the necessaries of life, and then took one, Joshua Delay, in as a *cropper* to live with him, using said Loring's teams, plows, seed and provisions, etc., etc ; that Loring's death was sudden and unexpected, and left said Delay in possession, who afterwards availed himself of the opportunity to claim the said tract of land as his own by virtue of the said Donation Law.

That there being no evidence of the said Loring having executed a will, the said Chapman was appointed administrator of his estate, and proceeded to prosecute the claim of said Loring to said lands before the register and receiver, the commissioner of the general land office; made all the necessary proofs, and filed all the necessary papers to establish the right of the said Loring to the said land; and the same were so confirmed and adjudged by all of the said departments, but, through some unexplained consideration, the then acting secretary of the interior, on the 9th of May, 1866, reversed the decision of the commissioner and issued a patent to the heirs at law of Delay, the said Joshua Delay having departed this life.

The bill sets forth all the facts necessary to establish the undoubted right of Loring to the land under the said act of Congress, and the wrongful and fraudulent act of Delay and his confederates in obtaining the patent to the same. The occupancy, as claimed by the Delays in their application for a patent, commenced after the death of Loring.

Soon after the issue of the patent to the Delays, the said

administrator being in the possession under a recovery in an action at law, the heirs at law of said Delay, and Lansing Stout, who had purchased an interest in said land, brought suit against the administrator, based upon the said patent, to recover the possession of the premises, and, after a lengthy litigation, the case was finally decided against the said administrator, at the term of this court, for the year upon a divided opinion, and, in pursuance thereof, possession was taken by said Delays and Stout.

While this litigation was pending, the will of Loring was admitted to Probate; the previous administration was closed, and the complainant, Chapman, was appointed administrator, with the will annexed as aforesaid.

On the 9th day of October, 1871, the "heirs at law" of Loring, who had never made any proof of Loring's occupancy except as herein stated, and complied with the statute, or of his death, but relying upon the proof made therein by the administrator, instituted a suit, in equity, in the Circuit Court of the United States, for the District of Oregon, against the defendants herein, who had become the assignees of the said Delays, under the said patent, to set the same aside and recover the said land.

It further appears from the bill, that, to the suit aforesaid, brought by the "heirs at law" against these defendants, they thereto pleaded, as a defense to said suit, the existence of said will of said Loring; its due admission to Probate, and that the same still remains as recorded; and that all the rights of the said Loring in the said lands, vested in the devisee of said Loring, the said Samuel Parker Hall.

It is further charged in the bill, that, notwithstanding that the defendants pleaded the said will, and the rights of the devisees thereunder, that the defendants combined to defraud

the complainants of their just rights, and to that end, for the nominal consideration of $5,000, took a *joint deed* for the same from the said "heirs at law" of said Loring.

The bill alleges that the said Page and Russell caused certain interests in the said land to be conveyed to their wives, respectively; and that each and all of the defendants had notice of the matters and things alleged in the bill.

In defense to the complainants' bill, the defendants demurred and set forth the following grounds of demurrer:

First. A misjoinder of parties plaintiffs.

Second. The administrator, with the will annexed, no where shows that he has any right to maintain this suit.

Third. That the said bill is multifarious.

Fourth. That the said complainants have not, by the said bill, made such a case as entitles them, or either of them, in a court of equity, to any discovery from these defendants, or either or any relief against them or either of them, as to the matter contained in the said bill, or any such matter; and that any discovery which can be made by these defendants, or any of them, touching the matter complained of in the said bill, or any of them, can not be of any avail to the complainants, or either of them, concerning any such matter, nor entitle the complainants to any relief touching the matters complained of.

Fifth. That neither of the complainants, nor any of them, have any interest in the subject matter of the suit, nor any title to institute a suit concerning it.

Sixth. That the matters and things set forth in the bill as grounds for relief, were had, done and transpired before the commencement of this suit, more than five years from the

alleged date of the patent, to-wit: May 9th, 1866; wherefore and for divers other good causes of demurrer appearing in the said bill, these defendants demur thereto; and they pray the judgment of this court, whether they shall be compelled to make any other or further answer to said bill, and that they be dismissed hence with their costs in this behalf sustained.

First. It is not a misjoinder for the administrator, with the will annexed, to join with the residuary devisees.

Daniels' Chancery Practice, 251, 267, 281.

Gaines, et ux. v. *Chew, et. al.*, 2 How., 619, 641, 642, 643.

Second. The administrator, with the will annexed, has a right, and it is his duty, in conjunction with the devisee, to bring this suit.

Third. The defendants are properly joined.

Daniels' Chy. Prac., 296.

Moore v. *Blagrave*, 2 Chy. Cases, 277, 316, 329.

Story's Eq. Pl., Sec. 544.

Andrews v. *Pratt*, 44 Cal., 319.

Hall v. *Russell*, 3 Sawyer, 509.

Shields v. *Thomas*, 18 How., 253, 261.

Fourth and *Fifth* grounds of demurrer are substantially one, and with the *sixth*, constitute the two grounds upon which the Circuit Court decided the case, to-wit:

First. That Loring had not a divisable estate.

Second. That the suit was barred by the statute of limitations of the state in respect to equity suits.

I shall confine my argument mainly to the two points decided by the court below; the other points made by the demurrer, being, as to matters of form, so clearly against the positions taken, as to have attracted no attention from the court.

The demurrer concedes that Loring had complied with all the requirements of the Donation Law to the time of his death, and that he was the rightful owner of the land; that the administrator made due proof of the facts, and that the land office certificate, in the name of the "heirs at law," was issued by the proper land officer, and delivered to the care and keeping of the administrator, and that Delay, through the benevolent designs of Loring, being a mere cropper, residing with and upon Loring's generosity, upon Loring's sudden death, took advantage of his position, and his presence on the premises of his benefactor to claim the land as his own, and by misrepresentations, fraud and perjury, obtained from the United States a patent for the same; that based on this patent, the defendants, in an action at law, about the year 1871, recovered from the administrator the possession of the premises.

The demurrer further admits among other things, that the defendants, at and before becoming the assignees of Delay, had full notice of the rights of Loring and the wrongful acts of Delay.

The demurrer further concedes that, at and before the defendants purchased the land from the "heirs at law" of Loring, they had full notice of Loring's will, its due admission to Probate, and that the rights of Loring in the premises passed under said will to his devisees; and that the defendants, under oath, in October, 1872, pleaded the same in a suit by the "heirs at law" against the defendants, to recover these same lands; and that the defendants, for the nominal consideration of $5,000, purchased the interest of the heirs at law in said lands, and now pretend that the interest in said lands, if any, obtained by them from the heirs at law, was a dona-

tion direct from the United States, and not obtained by inheritance from the said James L. Loring.

These are the prominent facts conceded by the demurrer, and upon which the court decided:

First. That Loring had not a divisable estate.

Second. That the statute of limitations of the state of Oregon, in relation to equity, was a bar to this suit.

I claim that the court erred in its decision upon both points before named.

I.

THE SETTLER, LORING, HAD A DIVISABLE ESTATE.

It is conceded by the court, in delivering its opinion, that if the heirs at law of Loring take by descent, that then Loring had a divisable estate, and the complainants would be entitled to recover, but it holds that the heirs at law take, as purchasers or donees, direct from the United States, and not by inheritance from James L. Loring.—*See* 3 *Sawyer*, 513, 514.

This involves a consideration of the nature of the estate granted to the settler by the act of Congress, entitled "*An Act to create the office of Surveyor-General of the public lands in Oregon, and to provide for the survey, and to make donations to the settlers of the said public lands.*" Approved the 27th September, 1850.—9 *Statute at Large, page* 496.

It also involves a consideration of the nature and effect of the conditions annexed to the grant.

NATURE OF THE ESTATE GRANTED.

FIRST.

This is determined by a consideration of the act of Congress of the 27th September, 1850, creating the office of Surveyor-General of the public lands in Oregon, to provide for the surveys and to make donations to settlers upon those lands.

Inasmuch as Congress possessed the supreme legislative powers in the Territory, we should distinguish between what is grant and what is general law incorporated into the act.

The first section creates the office with the same powers as other Surveyor-Generals of the United States.

Section 2, provides for the location of the office; the execution of bonds, and the appropriation of funds to defray expenses.

Section 3, provides for the mode of survey and manner of marking the lines.

Section 4, provides "that there shall be, and hereby is granted to every white settler or occupant of the public lands, American half-breed Indians included, above the age of eighteen years, being a citizen of the United States, or having made a declaration, according to law, of his intention to become a citizen, or who shall make such declaration on or before the first day of December, eighteen hundred and fifty-one, now residing in said Territory, or who shall become a resident thereof on or before the first day of December, 1850, and who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or three hundred and twenty acres of land, if a single man, and if a married man, or if he shall become married within one year from the first day of December, 1850, the quantity of one

section or six hundred and forty acres, one-half to himself and the other half to his wife, *to be held by her in her own right;* and the Surveyor-General shall designate the part enuring to the husband and that to the wife, and enter the same on the records of his office, and in all cases where such married persons have complied with the provisions of this act, *so as to entitle them to the grant,* as above provided, whether under the late Provisional Government of Oregon, or since, and either shall have died before patent issues, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon. *Provided,* that no alien shall be entitled to a patent to land granted by this act, until he shall produce, to the Surveyor-General of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but if any alien having made his declaration of an intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, *the possessory right acquired by him under the provisions of this act, shall descend to his heirs at law or pass to his devisees,* to whom, as the case may be, the patent shall issue. *Provided, further,* that in all cases provided for in this section, the donation shall embrace the land actually occupied and cultivated by the settler thereon. *Provided, further,* that all future contracts by any person or persons entitled to the benefit of this act, for the sale of the land to which he or they may be entitled under this act, before he or they had received a patent therefor, shall be void. *Provided, further,* however, that this section shall not be so construed as to allow those claiming rights under the treaty with Great Britain, relative to the Oregon Territory, to claim both under this grant and the treaty, but merely to secure them the election, and confine them to a single grant of land." 9 *Stat. at Large,* 497, 498.

Section 5, provides for grants to settlers settling in the Territory between the first day of December, 1850, and the

first day of December, 1853, of half the quantity allowed by section 4.

Section 6, provides, "that within three months after the survey has been made, or where the survey has been made before the settlement commenced, then, within three months from the commencement of such settlement, each of said settlers shall notify the Surveyor-General, to be appointed under this act, of the precise tract or tracts claimed by them respectively under this law, and in all cases it shall be in a compact form, and where it is practicable so to do, the land so claimed shall be taken, as nearly as practicable, by legal subdivisions; but where that can not be done, it shall be the duty of the said Surveyor-General to survey and mark each claim, with the boundaries as claimed, at the request and expense of the claimant; the charge for the same, in such case, not to exceed the price paid for surveying the public lands. The Surveyor-General shall enter a description of such claims in a book to be kept by him for that purpose, and note temporarily, on the township plats, the tract or tracts so designated, with the boundaries; and whenever a conflict of boundaries shall arise prior to issuing the patent, the same shall be determined by the Surveyor-General:

Provided, that after the first day of December next, all claims shall be bounded by lines running east and west and north and south, and *provided further*, that after the survey is made, all claims shall be made in conformity to the same, and in a compact form." 9 *Stat. at Large*, 498.

Section 7, provides, "that within twelve months after the surveys have been made, or where the survey has been made before the settlement, then, within twelve months from the time the settlement was commenced, each person claiming a donation right under this act, shall prove to the satisfaction of the Surveyor-General, or of such other officers as may be appointed by law for that purpose, that the settlement and cultivation required by this act had been commenced, specifying the time of the commencement; and at any time after the

expiration of four years from the date of such settlement, whether made under the laws of the late Provisional Government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act; and upon such proof being made, the Surveyor-General, or other officers appointed by law for that purpose, shall issue certificates under such rules and regulations as may be prescribed by the commissioners of the general land office, *setting forth the facts in the case*, and specifying the land to which the parties are entitled; and the said Surveyor-General shall return the proof so taken to the office of the commissioners of the general land office, and if the said commissioners shall find no valid objections thereto, PATENTS SHALL ISSUE FOR THE LAND ACCORDING TO THE CERTIFICATES AFORESAID, upon the surrender thereof."

Section 8, "that upon the death of any settler before the expiration of the four years continued possession required by this act, *all the rights of the deceased*, under this act, shall descend to the heirs at law of such settler, including the widow, where one is left, in equal parts, and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to the patent." 9 *Stat. at Large*, 499.

Section 9, reserves the school lands.

Section 10, makes grant of university lands.

Section 11, provides for the disposition of the "Oregon City claim."

Section 12, provides, "that all persons claiming lands under any of the provisions of this act, by virtue of settlement and cultivation, commenced subsequent to the first day of December, in the year eighteen hundred and fifty, shall first make affidavit before the Surveyor-General, who is hereby authorized to administer all such oaths or affirmations, or before some other competent officer, that the land claimed

by them is for their own use and cultivation; that they are not acting directly or indirectly as agents for or in the employment of others in making such claims; and that they have *made no sale or transfer*, or any arrangement or agreement *for any sale, transfer or alienation* of the same, or by which the said land shall enure to the benefit of any other person; and all affidavits required by this act, shall be entered of record by the Surveyor-General, in a book to be kept by him for that purpose; and on proof before a court of competent jurisdiction, that any of such oaths or affirmations are false or fraudulent, the person making such fraudulent oaths or affirmations, shall be subject to all the pains and penalties of perjury."

Section 13, "that all questions arising under this act *shall be adjudged by the Surveyor-General, as preliminary to a final decision according to law;* and it shall be the duty of the Surveyor-General, under the direction of the commissioner of the general land office, to cause proper tract-books to be opened for the lands in Oregon, and to do and perform all other acts and things necessary and proper to carry out the provisions of this act." 9 *Stat. at Large*, 499, 500.

Section 14, reserves mineral and other lands.

AMENDATORY ACT OF FEBRUARY 14, 1853.

Section 8, "that each widow now residing in Oregon Territory, and such others as shall locate in said Territory, whose husband, had he lived, would have been entitled to a claim under the provisions of the act to which this is an amendment, shall be entitled, under the provisions and requirements of said act, to the same quantity of land that she would have been but for the death of her husband; and that in case of the death of the widow, prior to the expiration of the four years continued possession required by said act, to which this is an amendment, all the rights of the deceased shall enure unto and be vested in the heirs at law of such widow."—10 *Statute at Large*, 159.

It is obvious, from an inspection of the provisions and scope of the act of the 27th September, 1850, known as the Donation Law, that Congress, in passing that act, intended to, and did, as far as practicable, conform to the state of things existing under the Provisional Government, as well as under the Territorial Government, up to the date of the act. The act expressly so declares in the following language:

"And in all cases where such married persons have complied with the provisions of this act so as to entitle them to the grant, as above provided, *whether under the late Provisional Government of Oregon, or since*, and either shall have died (9 *Statute at Large*, 497,) before patent issues, the survivor, or children, or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, EXCEPT WHEN THE DECEASED SHALL OTHERWISE DISPOSE OF IT BY TESTAMENT, DULY AND PROPERLY EXECUTED ACCORDING TO THE LAWS OF OREGON."

And this Court more than once has explicitly declared that it was the intention of Congress to so frame the Donation Law.

In the case of *Dolph* v. *Barney*, citing *Lownesdale* v. *The City of Portland*, Deady 11, *Stark* v. *Starr*, 6 Wall, 402, *Lamb* v. *Davenport*, 18 Wall, 307, *Starr* v. *Stark*, 94 U. S., 477, the Chief-Justice, having referred to the condition of things, proceeds to say:

"Finding this to be the condition of affairs, and recognizing the equitable claims of the inhabitants, Congress, within two years from the time of the organization of the Territorial Government, passed the Donation Act, which was framed so as to *conform in a large degree to the regulations of the old system, and to grant to the original settlers, holding under that system, the whole or a considerable portion of the lands they had been occupying and cultivating.*—7 *Otto*, 654."

In *Starr* v. *Stark*, cited by the Chief-Justice, Mr. Justice Field, in delivering the opinion of the court, says:

"That law established no system of pre-emption, nor recognized any such system as having been previously in existence in the Territory. It substantially gave to every settler, upon certain conditions, the land which he occupied, excepting only mineral and saline lands, and such parcels as might be reserved by the President, for forts, arsenals and other public uses. The law (Donation Act) as well observes Mr. Justice Deady, in the able opinion from which we have already cited, 'was a system complete within itself and admirably adapted to the condition of the people and the country as it found them,' *and was 'a practical recognition and confirmation of the land law of the Provisional Government.'*" *6 Wall*, 417.

In the case of *Davenport* v. *Lamb*, the same justice, delivering the opinion of the court, says:

"At the time this covenant was executed, the title to the property was in the United States, and this fact was well known to the parties. Land was then occupied by settlers throughout the Territory of Oregon UNDER LAWS OF THE PROVISIONAL GOVERNMENT, which were generally respected and enforced." 13 *Wall.*, 429, 430.

It is a fact not now open to dispute that the Provisional Government and laws thereunder, as well as the laws under the Territorial Government, passed at a session of the Legislative Assembly which had just been held, were all before Congress when the Donation Law was passed; it is therefore pertinent to enquire what the Provisional Government was; what laws had been passed under it, as well as what laws had been passed by the then Territorial Legislature, bearing upon the questions of inheritance and devise.

It was by authority and in pursuance of the treaty of joint

occupancy, that Oregon was settled by American citizens and British subjects. It being a distant and isolated country, over which neither of the treaty powers had extended their jurisdiction and laws, the treaty necessarily implied the right, as the circumstances produced the necessity, of organization and self-government. In the race for the supremacy in settlement and population, and the consequent power of moulding the institutions and settling the question of boundary, the British Government hoped to win the prize, yet, through the superior intelligence, enterprise and energy of our people, the hardy pioneer settler of that country, an early and lasting impress was made of American constitutions and laws.

THE PROVISIONAL GOVERNMENT AND LAWS.

A Provisional Government was formed by the people without distinction of citizenship. It provided, 1st, that no person should be molested on account of his mode of worship or religious sentiments.

Section 2, following the Ordinance of 1787, providing for the Government of the North-western Territory. It provides:

"That the inhabitants of said Territory shall always be entitled to the benefits of the writ of *habeas corpus* and trial by jury, of a proportionate representation of the people in the Legislative and of judicial proceedings, according to the course of the common law," and so on.

Section 3, encourages religion, morality and education.

Section 4, prohibits slavery and involuntary servitude.

Section 5, preserves the right to bear arms.

Section 6, divides the power of this Government into Legislative, Executive and Judicial departments. It proceeds

to define the powers and duties of the different branches according to the form and effect of American constitutions and laws.

Possession and occupancy was a treaty right, and having laid the foundation of civil government, they proceeded to lay the foundation for title to real estate. Individual possession and occupancy was a necessity, and the power to regulate and protect it, was not only implied in the treaty, but was inherent in the people; to this end they incorporated in the organic law what is termed the

LAND LAW.

Article 3, provided for taking and holding claims of 640 acres; marking the boundaries and recording the claim; beginning occupancy and improvement, restricting individuals to one claim, and giving the action of trespass against intruders, and requiring claims to be bounded by lines running to the cardinal points.

This was reasonable, among themselves attractive to immigration, and conformable to the general sentiment of the American people as manifested in the debates in Congress, and in the letters and writings of prominent men published throughout the country as well as in Oregon.

Having carefully secured and guarded the rights of individuals in the possession and occupancy of their claims to the land, upon which they were engrafting their labors and improvements, they thought it necessary and not unbecoming to provide for the disposition of such rights in case of the death of the settlers.

Accordingly, at the first session of the Legislature, under this new Government, an act was passed providing, that in case of the death of such settler, the possessory rights of the

deceased should descend to his heirs at law as other real estate.

Conformably to this law the people of Oregon took and held lands and made improvements thereon.

NOW COMES THE ORGANIZATION OF THE TERRITORIAL GOVERNMENT.

On the 14th of August, 1848, Congress passed an act "to establish the Territorial Government of Oregon."

This act, among other things, provided:

"That all the laws passed by the Legislative Assembly shall be submitted to the Congress of the United States, AND, IF DISAPPROVED, shall be null and void."—9 *Statute at Large*, 326, *section* 6.

Another provision was made extending the articles of compact, in the ordinance of 1787, to the inhabitants, and providing:

"That the EXISTING LAWS now in force in the Territory of Oregon, under the authority of the Provisional Government, established by the people thereof, shall continue to be valid and operative therein so far as the same be not incompatible with the constitution of the United States and the principles and provisions of this act. * * But all laws heretofore passed in said Territory making grants of land, or otherwise affecting or incumbering the title to lands, shall be, and are hereby declared to be, null and void."

The act continued all suits, process, recognizances, bonds and rights of action under the Provisional Government and transferred them to the new jurisdiction, and continued in office all inferior officers.

Notwithstanding it was obvious that the land law of the Provisional Government made no pretense of interfering with

the primary disposal of the soil, nor made any grant of land *in the sense of the repealing clause just quoted*, doubts were entertained by some whether the Land Law had been repealed; therefore, as a matter of safety to the peace and good order of the people, it was deemed advisable to re-enact it.

LAND LAW OF THE PROVISIONAL GOVERNMENT IN FORCE.

At the first session of the Legislative Assembly under the Territorial Government, by an act approved the 12th day of September, 1849, preceded by a preamble, reciting that whereas doubts had arisen whether or not the Land Law of the Provisional Government was in force, the said law was revived.

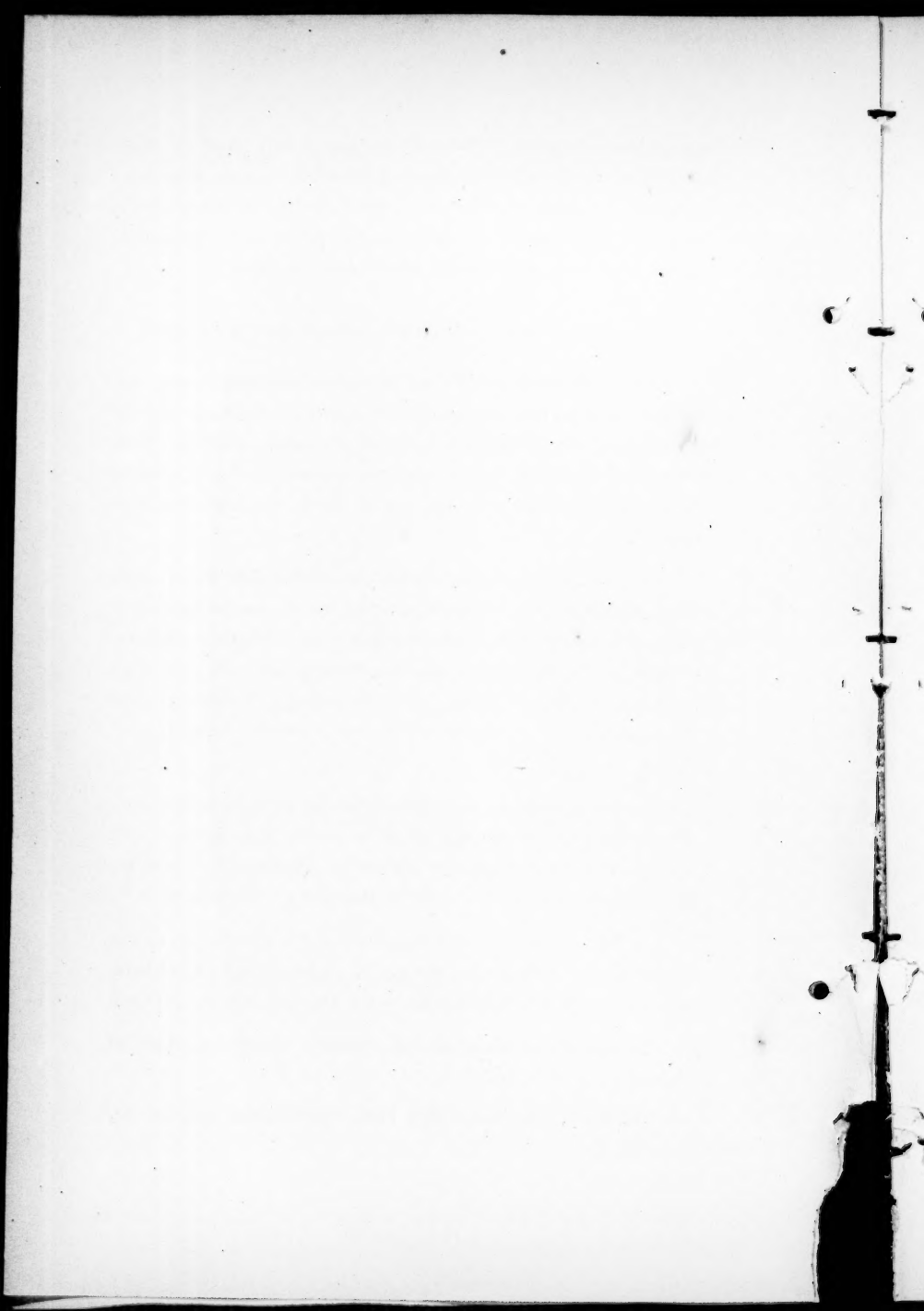
Section 1, declares the Land Law of the late Provisional Government to be in force, and limits the claims to 640 acres each, concluding with a proviso that "no foreigners shall be entitled to the benefits of said act, hereby revived, who shall not have, within six months after the passage of this act, filed his declaration of intention to become a citizen of the United States."—*Deady's Code of*

Section 2, repeals so much of the act as accepts $5 annually in the place of occupancy or residence, and declares that a neglect to reside upon, or otherwise improve the claim for the space of six months, shall be deemed an abandonment.

Section 3, declares that no person not a white male citizen of the United States over the age of eighteen years shall hereafter be entitled to take claims under the act hereby revived.

Section 4, makes clerks of Probate Courts recorder of claims.

Section 5, provides "that land claims shall descend to,



and be inherited by, the heirs at law of the deceased claimant in the same manner as is provided by law for the descent of real property."

WILLS.

At the same session of the Legislative Assembly, at which the act just quoted was passed, an act was passed relating to wills.

Section 1, provides "that every person twenty years of age and upwards, of sound mind, may, by last will, devise all his estate, real, personal and mixed, and all interest therein, saving to the widow her dower."—*Deady's Code of*

Section 52, provides, "that all courts and others concerned in the execution of last wills, shall have due regard to the direction of the will, and the true intent and meaning of the testator in all matters brought before them."—*Deady's Code of*

This act was approved the day of 1849.

These several enactments were undoubtedly before Congress when the Donation Law was passed, and so far from repealing them, the Donation Act recognized their existence and engrafted the fee upon the possession and occupancy they created, protected and regulated. Such of those laws, therefore, as regulated the inheritance and sanctioned the power of devisee, except as the Donation Law expressly modified them, remained in force.

Moreover, those acts are taken as an indication of the spirit and intent of the provisions, respecting inheritance and devise, framed as a part of the Donation Law. They were a part of the existing state of affairs to which the Donation Law was intended, so far as practicable, to conform, as repeatedly decided by the court.

SECOND.

THE ESTATE GRANTED IS A PRESENT GRANT IN FEE SIMPLE.

By the 4th section of the act referred to, it is provided:

"*That there shall be, and hereby is*, granted to every white settler, and occupant of the public lands, * * * the quantity of one-half section, or three hundred and twenty acres, if a single man." 9 *Stat. at L.*, 497.

Loring was a single man, and a resident of Oregon at the date of the act. He settled upon the lands in question, filed his notification and made his first proof—proof of settlement. This was a present grant, and at the date of settlement vested in Loring and his heirs forever, the whole estate in the precise tract settled upon. The language is "*that there shall be, and hereby is granted,*" etc.

This language has received a settled construction by this court. In the case of *Schulenburg* v. *Harriman*, Justice Fields, in delivering the opinion of the court, says:

"That the Act of Congress, of June 3rd, 1858, passed a present grant of the lands designated, there can be no doubt. The language imports a present grant, and admits of no other meaning. The language of the first section is, "*that there be and hereby is granted* to the State of Wisconsin, etc." 21 *Wall.*, 60.

The language here used is identical with that used in section 4 of the Donation Law, now under consideration. The Supreme Court in the above case, cites,

Green v. *Rutherford's Heirs*, 2 Wheaton, 196.

Leisieur v. *Price*, 12 How., 77.

See also United States v. *Arredondo*, 6 Peters, 745.

Freemont v. *The United States*, 17 How., 558–9.

It is clear then, that by the granting clause of the act, Loring took the whole estate in the lands—an estate without restriction—the largest estate man is capable of enjoying—the entire property—the fee simple. It was an estate to him and his heirs forever, as effectually as though the word "heirs" had been inserted in the grant.—2 *Black. Com.*, 106; 4 *Kent Com.*, 511, 512, 513.

It made no difference that the tract lacked precision; that it was required to be settled upon, and notification and proof of settlement to be made. Upon these being done, the title in the precise tract vested in Loring. He became possessed of an estate of inheritance, which, upon his death, would descend to his "heirs at law" from their ancestor; it was, therefore, a devisable estate.—*Jarman on Wills*, 40; *Redfield on Wills*, 390, *Sec.* 17.

But to this estate there was annexed certain conditions, by which it is claimed for the defendants that the estate was abridged, so as, that by the death of Loring, it became a life estate in him, with remainder to his heirs at law in fee simple—they taking as purchasers direct from the United States—making them the first stock from which the estate might descend.

This proposition we claim to be utterly untenable.

It will be observed that by far the greater portion of the act of the 27th September, 1850, is composed of enactments of general law respecting the public lands in Oregon, in no manner determining the quantity or quality of the estate granted. This is clearly indicated by the title of the act, and quite obvious in an examination of its details.

By the 4th section of the act, it is provided that the claimant, having settled upon the tract, shall reside upon and cultivate the same, continuously, for four years. This is a

condition subsequent, to be construed and have effect according to the well established rules in relation to such conditions.

A subsequent condition is one which operates upon an estate already created —4 *Kent*, 125–130.

Such is the condition of four years' residence and cultivation required by the 4th section of the act of the 27th September, 1850. The estate vested in Loring on the passage of the law and applied to the particular tract by the commencement of settlement and cultivation, but he was required, in person, to keep the condition by continuing for four years to reside upon and cultivate the land; therefore, in view of a full compliance with this condition, it was necessary that the law making powers of the United States, should provide for collecting and preserving, in an authentic form, the evidence of title and of conditions performed. This was done by creating the office of Surveyor-General of Oregon, and, among other things, requiring him to receive the notification of the precise tract claimed, and proof of actual settlement upon the same; at the end of four years he was to receive proof of the continuous four years' residence and cultivation; issue a certificate reciting the notification, first proof, and final proof, describing the lands, and, upon this certificate alone, embracing the proof of the four years' residence, a patent should issue to the settler. These were substantially the provisions of the sixth and seventh sections of the act.

Now the title or estate created by the granting clause of the act, had vested in Loring the settler; he had filed his notification and made his proof of having settled on the land, and died before the expiration of the four years' residence and cultivation. Under these circumstances, what became of the estate? Death, the act of God, had rendered it impossible for him to complete the residence and cultivation required by

the 4th section of the act. By his death was the condition broken, and did the estate revert to the donor? Certainly not.

If the condition subsequent be possible at the time of making it, and afterward become impossible to be complied with, either by the act of God or of the law, or of the grantor, the estate of the grantee being once vested, was not thereby divested, but become absolute. The title having vested in Loring subject to the conditions thereafter to be performed, so long as the conditions remained unbroken, the estate remained in the same situation as if no condition had been annexed. So far as the conditions were concerned, he could have conveyed or devised or transmitted the inheritance to his heirs. It would still continue defeasible until the condition be performed, *destroyed* or released. Loring having performed the conditions to the time of his death, the further performance became impossible, the conditions were *destroyed*, not broken, the estate became absolute and passed by inheritance to his heirs at law, subject to the devise.

This is a proposition universally admitted, and the learned judges, who decided the case below, in their opinion admit it; but in such a case, without section 8, there was no provision for collecting and preserving, in authentic form, the evidence of conditions performed or destroyed. The settler, in such case, and his successors would have no record evidence of title; because section 7 only provides for receiving proof of four years' residence and cultivation, issuing certificate thereof, and patent thereon reciting the same. In case of death it was impossible to comply with the regulations prescribed in section 7, and, therefore, apparently, as an after thought, section 8 was introduced to supply the omission, particularly the latter clause.

Section 8, provides, "that upon the death of any settler before the expiration of the four years continued possession required by this act, *all the rights of the deceased*, under this act, *shall descend* to the heirs at law of such settler, (including the widow where one is left), in equal parts; and proof of compliance with the conditions of this act, up to the time of death of such settler, shall be sufficient to entitle them to the patent." 9 *Stat. at L.*, 499.

In case of a single man, this did not abridge or enlarge the estate of either the donee or his heirs at law, as granted by the 4th section, or give any different direction to the estate.

The first clause of the section declares that the rights of the settler, in such case, shall descend to the "heirs at law." What rights shall descend? Why, the estate of the settler at the time of his death—the fee simple. The very estate which we have shown by the common law, and adjudged cases, descended to the heirs at law without this clause. This clause, so far as related to a single man, was a re-enactment of the law as it stood without it. But, without altering that law, it was pertinent as a prelude to the subsequent clause, made necessary by the omission in section 7, providing for proof. It was as much as to say, whereas, by law, on the death of the settler, before the expiration of the four years, his estate, in the lands, descends to his heirs at law, therefore proof of compliance with the conditions of this act up to the time of death of such settler, shall be sufficient to entitle them to *the* patent.

The court below, however, construed the clause in effect as creating in Loring an estate for life, remainder in fee to his heirs at law. In this view the court proceeds to say:

"Had Loring a devisable estate in the premises? We think not. His interest terminated with his death, and therefore he had nothing to dispose of."

If Loring had nothing to dispose of, if he had no rights, if his estate terminated, if he had no estate to dispose of, then the heirs at law *took nothing*, for the clause of the section under consideration only declares that *his rights, his estate*, should descend to the heirs at law. If he had but a life estate, then, at best, only a life estate descended to the heirs. By no possibility, under the clause of section 8, or under the general law, could the heirs take more or less than the estate of the settler.

The proposition, it seems to me, would be an absurdity upon its face. It would be creating in Loring an estate for life, and in the heirs at law the same estate for life, with necessarily the reversion in the United States, the remainder after the estate for life being unprovided for. No, it was not his estate, but the condition of the four years residence and cultivation that terminated by his death, whereby the estate became absolute as though no such condition had been annexed, or in other words, as though the condition in section 4 had expressly provided, "four years residence and cultivation if the settler shall so long live." These were the rights of the settler. In contemplation of law they existed from the date of his settlement.

Applying another rule of construction to the first clause of section 8, would seem of itself to settle the question whether the heirs at law in this case take by descent or by purchase, that is, that when technical words are used in an act of Congress, they must receive their known accepted interpretation. The clause referred to in section 8, declares that the rights of the settler shall *descend* to the *heirs at law*. The word "*descend*" and the words "*heirs at law*," have a well known and established signification. They are the very words of all others to accomplish the object we claim for them, to-wit: the transmission of the estate to the heirs at law as an inheritance, and

to use the chosen language of this court, "they admit of no other interpretation," and are in strict harmony with the granting clause of the act, without which there could have been no rights of the deceased to descend.

It was claimed for the defendants that the word descend has no other meaning or effect than to give the estate to the heirs at law in consideration of the services and death of the ancestor. But there is lacking in this case, all the elements necessary for the application of this construction. In this respect it is unlike a deed or will with subsequent qualifying words, making it necessary to give this construction for the purpose of carrying out the intention of the donor. It is a legislative grant in a Territory over which the donor had unlimited legislative power within the constitution, and, in relation to a subject matter especially confided to its jurisdiction, and the language of the act should have that interpretation which *its terms plainly* import; nor is there a single word in the act indicating any other consideration for the descent of the estate of the settler to his heirs at law, than such as would move a local legislature in providing for the descent of real property generally—that is, upon the death of the settler, his estate shall descend.

It is claimed for the defendants that the closing sentence of the second clause of section 8, confers upon the heirs at law the fee simple *as by purchase direct* from the United States. The words are "shall entitle them to *the* patent." The patent in this case does not confer title, nor does it confer title in any case under the act of the 27th September, 1850. The granting clause of the 4th section confers title in words of present grant, and the patent, by its recitals, becomes the record evidence of conditions performed—that is to say, it contains the evidence of settlement, notification, first proof—

proof of four years' residence and cultivation, or death and compliance to that time; and upon these, section 7 declares the patent (certificate) shall issue, setting forth the facts in the case, which being reported to the commissioner of the general land office, "if he shall find no valid objections thereto," (says the section) "patent shall issue for the land according to the certificate aforesaid."

Now, it is obvious that section 8 makes no express provision for setting forth in a certificate the facts to be proved in case of death, nor any other facts, nor the issue of a certificate at all. The position contended for on the part of the defendants, that the words referred to confers title, necessarily excludes the issue of certificate with the recitals before mentioned and the basing patent thereon, and substitute or interpolates the indefinite article "a" for the definite article "*the.*" *The patent*—evidently meaning the patent provided for in section 7, with its pre-requisites of certificate and recitals of the facts in the case.

And this is the invariable usage in the Land Department. Under section 8, the patent would be issued to "the heirs at law" in that language, terms importing succession of inheritance, and not to them by name as individuals, or to "the heirs of Loring." as assumed in the opinion of the court; and this too is the usage of the Department. The patent would be a nulity without the recitals required by section 7. With such recitals, the heirs at law would be estopped to deny that they were in as successors, by inheritance, to the rights or estate of the deceased.

Neither, as assumed by the court, "must the heirs claim the donation, and make proof of compliance of the ancestor, and of their relation to him." Any one may make the proof of compliance with the conditions; usually it is the administrator

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or executor, and proof of the relation of particular persons as heirs is not required. No such power is conferred upon the Land Department as authorizes it to determine who are and who are not "heirs at law." This is left to the law, and, if necessary, to future judicial determination.

Some reliance is placed upon the words, "including the widow, where one is left, in equal parts," as showing that the heirs at law could not share with the widow in equal parts, and at the same time take by inheritance, because, as they say, it would not be the same estate in quantity that would descend to them as by inheritance, and that therefore the word "descend," as they say, means nothing more than *pass* or *go*.

This might be a subject for discussion *if there was a widow in the question.* But Loring was a single man, and therefore the section is construed as though no such words had been inserted. They take the same estate which the ancestor had, moreover it was the law making power in the donor, competent to make the widow an heir.

Nor is it admitted that because the law making power changes the proportion of the property that descends, it thereby changes the nature or character of the estate.

The case of *Fields* v. *Squires*, Deady's Report, 383, is relied upon by the Circuit Court as sustaining the position with reference to the effect claimed for the words "including, the widow, where one is left, etc." That case grew out of the provision of section 4, respecting the rights of the survivors of a deceased wife, as such rights might or might not be affected by certain covenants for title contained in a deed, made by the surviving husband before the passage of the Donation Law. In that case the deed contained two covenants, one for general warranty against all persons, the United

States excepted, the other for further assurance that if the covenantor should obtain title from the United States, he would convey the same to the covenantee. The condition of four years residence was performed when the wife died, but patent had not issued. In such case the law provides that, "the survivor and children or heirs shall be entitled to the share or interest of the deceased in equal parts." The suit was by the covenantee of the survivor against the heirs of the covenantor, who had also died. By the operation of section 4, the covenantor had obtained one-fifth of the estate of his deceased wife; and had obtained, by purchase, one-fifth from an heir of his wife by a former husband. Under the first covenant the District Court held that the exception excluded the one-fifth obtained from the heir of the deceased by a former husband; that it was the United States and all persons claiming under it that was excepted, and that therefore the complainant took nothing by the first covenant.

As to the second covenant, "that if the grantor obtained title from the United States, he would convey it, etc," it was held by the court, that if, by operation of section 4, the survivor, the covenantor, took direct from the United States, as by purchase, then the one-fifth of the estate of the deceased was bound by the covenant for further assurance. But if, on the contrary, the survivor took by descent from his deceased wife, then the one-fifth, obtained from his wife's estate, by operation of section 4, was not bound. In the mind of the court it became a question of "descent" or "purchase."

Widely as the facts in that case differ from the case on hearing, and notwithstanding the court held it to be a case of purchase, at the same time the argument of the court sustained most powerfully our position, that this is a case of taking by descent.

Treating the estate as a remainder, the court in that case says:

"But if the remainder is given to any other person than the heir of the first taker, or to such heir *with* another person, or to only a portion of the persons constituting the heirs of such first taker, the case is not within the rule, and the persons to whom the remainder is given, take under the grant as purchasers. To be in by descent, a person must take as heir in the quality of heir, and take neither more nor less than the law would give him as heir independent of the grant. If, by the terms of the grant, the heir is to take exactly what the law would have cast upon him on the death of his ancestor, the case is within the rule, and he is deemed to be in by descent and not by purchase. *You cannot, by any grant or conveyance, provide that an estate, after the life of the first grantee, shall go in the exact line of descent, and at the same time the heirs be considered as in by purchase, and not liable to the incidents and burdens of an estate by descent*—4 *Kent*, 215, 232; 1 *Washburn on Real Property*, 78; 2 *Jarman on Wills*, 178; *Lessee of Bond* v. *Swearingen*, 1 *Ohio*, 395." *Deady, p.* 383, 384.

Of course, this decision is not authority for, or binding upon this court, but being cited by the learned judges who decided this case, I have quoted from it to show, that so far from sustaining the position that the heirs at law of Loring take by purchase, it is squarely against it, and the authorities cited in that decision are to the same effect.

But it will be born in mind that the learned judge here has in his mind a case arising under a deed or will, whereas the estate, in this case, passes to the heirs by the express language of the Donation Act, by descent.—The supreme law making power has so declared.—*Section* 8.

In the same connection the court below cites the case of *Stephenson* v. *Hagan*, 15 B. Monroe, 282, 315. This, like

the case of *Fields* v. *Squires*, it seems to me, is equally with the other, against the position taken by the court, and clearly describes such an estate as that of the heirs at law of Loring as being obtained by descent. The case was this: Robinson covenanted to stand seized to John and Dorothy Pitman of 165 acres of land, for and during the term of their natural lives, and for and during the term of the life of the longest liver of them, and at the decease of the said John and Dorothy, his wife, *then* the before mentioned 165 acres of land with its appurtenances shall ensue, and descend to the heirs of the said John Pitman, lawfully begotten on the body of Dorothy Peyton Pitman, his present wife, "and shall be vested in such heirs in fee simple." The grantor then covenanted, that upon the death of Pitman, without leaving issue of their bodies, to stand seized, and granted and sold said tract of land to William Peyton Robinson, and their heirs forever, as tenants in common. Dorothy Pitman died, leaving issue, and John Pitman, after the death of his wife, conveyed the land to Wm. Robinson, Jr., through whom it passed to Hagan. Mrs. Stephenson, one of the heirs of Dorothy, sues for her share of the land.

In the language of the court, "the only question was whether the conveyance to John Pitman created in him, as the survivor of his wife, a fee tail or a mere estate for life. We are of the opinion, therefore, that Pitman had only an estate for life in the land, and that the heirs of the body of himself and wife, living at his death, took a new fee simple, they were in by purchase; whence it follows that, upon the facts now appearing, Mary Jane Stephenson was entitled to recover one-half of the land in contest in this case."—15 *B. Mun*, 315.

It is not the conclusion arrived at by the court in the case cited in 15 *B. Monroe*, that the heirs of the body take by purchase, that bears upon this case, but it is the facts stated

and the argument of the court upon which that final conclusion is arrived at. It was admitted in the argument of that learned court, that the terms heirs of the body were words of limitation and not of purchase; but reasoning upon other words in the conveyance, it was found that those other words or terms, established most clearly in the minds of the court, that the donor used and intended the words "heirs of the body" to be understood in a different sense than their technical meaning, Because: First, the primary disposition of the estate was for life; Second, that in addition and qualification of the words, "shall ensue and descend to the heirs of John Pitman and Dorothy, etc.," then followed these words "and shall be vested in such heirs in fee simple." In referring to these two estates, the court say:

"The heirs of the body are to have an estate different, not only from that which the deed, by its terms, gives to the ancestor, but looking to all of the terms which could be regarded as applying to his estate would give to him. HAD THE DEED STOPPED WITH THE DECLARATION THAT, AFTER THE DEATH OF THE SURVIVOR OF THE TWO DONEES FOR LIFE, JOHN AND DOROTHY PITMAN, THE LAND SHALL ENSUE AND DESCEND TO THE HEIRS OF THE BODY OF JOHN PITMAN ON THE BODY OF HIS WIFE, DOROTHY PITMAN, BEGOTTEN; *then* John Pitman, after the death of his wife, would have been tenant in fee tail special."—15 *B. Munroe*, 312.

Here then we remark that the supposed case put by the court, the technical words "ensue and descend," and "heirs of the body,"—words even less expressive of a technical meaning, than those used in section 8 of the Donation Law in question, are to have the effect to be produced by their legal and technical meaning as words of limitation and not of purchase, and that too when preceded by a grant of an estate for life, only as expressly stated in the *habendum*. But the

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real case then before the court was different. The conveyance had the qualifying words added, "and shall be vested in such heirs *in fee simple*," which by grafting upon the "heirs of the body" a new and different estate from that granted to the first donee, qualified the words "ensue and descend to the heirs of the body," and divesting them of their legal and technical meaning, interpreted them in the sense merely of "pass or go." It is apparent, therefore, that instead of the opinion of the court in 15 *B. Munroe*, sustaining the court in interpreting the words "all the rights of the deceased under this act shall descend to the heirs at law of such settler," as in the sense merely of "pass or go," the opinion of the court is directly to the contrary, and, in our case, would give to such words the effect to be produced by their legal and technical sense, as establishing in the ancestor an estate of inheritance which the heirs at law take by descent.

From the opinion of the court in this case, we are authorized to infer that it was not at all times exactly clear to its mind what the rights or estate of the settler was at the time of his death. In one view of the case, it was a PRESENT GRANT, with a condition which the act of God destroyed or terminated, and the estate, by the common law, became absolute and descended to the heirs at law as an inheritance, and that the heirs at law would take by descent, subject to the devise entitling the complainants to recover, a proposition which we assent to, and which, 2 *Black Com.*, 156; 4 *Kent. Com.*, 127, pronounce to be law. In another view of the case the court say:

"What were the rights of such settler at the time of his death is not apparent. To all intents and purposes his interests in the premises terminated with his decease."

It seems to me, with all respect for that learned court, these are contradictory propositions, and that both are in con-

flict with the opinion so clearly expressed by the court in the outset, and sustained by Mr. Blackstone and Chancellor Kent; that by the death of the settler the condition became impossible, in which case the general law would have excused the act, and thereupon the estate would have become absolute and descended to his heirs as a fee simple. But they are the result of assuming that the word "descend," in this case, means nothing more than "*pass or go.*" To determine that the settler's interest terminated with his decease, implies that he had but a life estate, and that the issue of patent conferred upon the heirs at law a fee simple, direct from the United States by purchase.

I have already given my views of the office and operation of *the* patent, and will not discuss it further, except to say that it is by its recitals the record evidence of conditions performed, and that the rights of the settler had descended to the heirs at law as by inheritance, and not by purchase. It is therefore *the* patent with its recital, provided for in section 7, to which the heirs at law are entitled.

But suppose, for the sake of the argument, that section 8, instead of saying that all the rights of the settler, under the act, shall descend to the heirs at law, that it had said all the rights of the settler, under the act, shall "pass and go" to the heirs at law of such settler, it would not, in that case, even when read in connection with the words, "all the rights of the settler, under the act," and referring to the granting clause to ascertain those rights, have engrafted upon the heirs at law any new or different estate than that possessed by the settler, the ancestor, or have divested the words "heirs at law" of their legal and technical meaning. It would still be the estate of the ancestor, derived, by operation of law, by descent. In the case cited by the court, (15 *B. Monroe*, 315), as sustaining

the application of the words "*pass or go*," it is declared in effect to be inapplicable as a substitute for the word "descend." The court there says emphatically, that *had the deed stopped with the words ensue and descend*, John Pitman would have been tenant in fee tail special. The words heirs of his body would have operated as words of limitation, applying to and describing his own estate, and not as words of purchase indicating or securing any direct benefit to the heirs. But the deed did not stop there, but declared that the lands should vest in the heirs in fee simple, an entirely new and different estate from that granted the donee.

As claimed by the court in this case, the words *pass or go*, would, after being interpolated, become the qualifying words of the other words "heirs at law," instead of being substituted for the word descend, in order to harmonize with the previous grant, and with the words heirs at law, as qualified by any subsequent qualifying words, such as "at her death to be equally divided between the heirs, etc.," as found in 10 *B. Monroe*, unto S. W. for life, *then to his heirs forever*, found in 14 *B. Monroe*, "and shall be vested in such heirs in fee simple," as found in 15 *B. Monroe*.

In this case there is no necessity for giving to the word descend any other than its legal and technical meaning, in order to harmonize with the grantee's rights or estate of the settler, and with the rights or estate of the heirs at law. In this case the legal and technical meaning of the word descend, already harmonizes with the previous grant, made absolute by the act of God, and with the words "heirs at law," as words of limitation and not of purchase. Besides the word "descend" having a legal and technical meaning, and used in an act of Congress, must be construed accordingly. For these reasons the heirs at law take by descent subject to the devise.

Referring to the right of the settler under the act, while admitting that it was a grant in fee, upon the condition of four years' residence and cultivation, and a condition which, if it should become impossible to be fully performed by death—the act of God—the grant would thereupon become absolute, and descend to the heirs at law as an inheritance subject to devise; it is at the same time claimed by the court below, that it was, upon the further contingency, that if death should occur, that death should be treated as a breach of the condition and as a forfeiture of the estate, and thereupon it should be granted anew to the heirs at law as by purchase. This is evidently an error. The further condition or grant of the estate, is not to be found in the section. It is the condition of full four years' residence to which the contingency of death applies, and not to the estate, and modifying the proof of compliance, required by section 8, to comply with the contingency of death, and thus making the whole to harmonize with the original grant in fee, with the condition of four years' residence and cultivation, embracing, by implication of law, if he should so long live.

I think it may truthfully be asserted, that in all the leading cases, in which the estate acquired by the heirs have been decided to have been acquired by purchase, that the opinions of the courts, and the argument of Counsel, on both sides, have admitted the rules by which the heirs at law in this case are in by descent and not by purchase, and that if the estate is descendable, it is devisable.

In justice to myself, and the propositions I have submitted, I beg leave to refer to that part of the opinion of the court below, in which reference is made to the position of counsel for the plaintiff. "That this was a grant to Loring for life,

with remainder to his heirs at law, and that such a grant is within the rule in *Shelly's case*."

The statement of the court was correct when applied to the position of an associate counsel having no control of the case.

The position was not anticipated or sanctioned by myself. The bill, as is manifest, is not based on that theory. I did not then, do not now, and never have contended that the grant, as to Loring, was for life, with remainder to his heirs at law. It would be, at least, a very liberal admission, if I should express the opinion, that upon this point the section is even open to criticism. On the contrary, I claim the grant was to Loring in fee simple, upon condition of four years' subsequent residence and cultivation, which becoming impossible of full performance by reason of death, by the common law and by section 8, his estate became absolute and descended to his heirs at law as by inheritance, and, therefore, subject to the devise.

In addition to the devisability of the estate in Loring, incident to the nature and purport of the grant, the conditions subsequent impossible of complete performance, and the descent of his rights under the grant to the heirs at law, the power of devise is implied from other provisions of the act relating to other classes of settlers.

In that of section 4, relating to the rights of married persons, dying after the expiration of four years' residence, and before the issuance of patent, "that the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, *except* where the deceased shall otherwise dispose of it by testament duly and properly executed according to the laws of Oregon." Here, where the estate has become absolute, separately and

distinctly in the husband and wife, the survivor is introduced to share with the children and heirs in equal parts. Notwithstanding this, the devisability of the estate is admitted—expressly recognized.

Again, in the case of an alien settler, section 4 provides:

"That no alien shall be entitled to a patent to land, granted by this act, until he shall produce to the Surveyor-General of Oregon, record evidence that his naturalization as a citizen of the United States has been completed; but if any alien, having made his declaration of intention to become a citizen of the United States, after the passage of this act, shall die before his naturalization shall be completed, the possessory right acquired by him under the provisions of this act, shall descend to his heirs at law or pass to his devisees, to whom, as the case may be, the patent shall issue." 9 *Stat. at Large*, 497.

Here too, the devisability of the rights or estate of the settler is admitted; and in both cases by exception, repelling any implication of conferring an estate by purchase, and going further in the latter case brings the "possessory rights of the settlers," the word "descend," and the words "heirs at law," the words "devisees" in juxtaposition, showing, beyond question, the sense in which those words are used, not only in these particular clauses, but through the act. It is not pretended on the part of the defense, that the alien clause is not broad enough to include a settler having made his declaration after the passage of the act and dying before the expiration of the four years and devising his estate, but it is assumed that in view of section 8 providing that upon the death of any settler before the expiration of the four years, that the alien clause ought to be construed, if it reasonably can be, so as not to interfere with the specific provisions of section 8, and that therefore it should be construed as exclusively applying to cases of death after the four years residence and before issue

of patent. We admit that the language is broad enough and does apply both before and after the expiration of the four years residence; but applied to either or both, the specific and imperative language pointing to the rights of the settler descending to the heirs at law, or passing to the devisee, must bear their intended sense and have their legitimate effect. If the alien be a married man, and the clause be applied after the four years, then it conflicts with the clause by which it is provided, that upon either of such married persons dying before issuance of patent, the survivor and children, or heirs of the deceased, shall be entitled to the share or interest of the deceased in equal proportions, except where devised. They could only be made to harmonize by construing the clause in regard to "such married persons" as being a rule of descent, and the survivor and children as heirs at law subject to devise. But as that question is not before the Court, and might possibly arise in the future, I do not propose to discuss it. If we construe the alien clause as applying as well to the case of death before the completion of naturalization, and before the four years residence, it would have the full force and effect which its language imports, and harmonize with section 8 in declaring that the rights of the settler shall descend to the heirs at law as by inheritance subject to devise; the words in the other clause, "to whom, as the case may be, the patent shall issue," would be supported and carried into effect by the essential clause of section 8 providing:

"That proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent." 9 *Stat. at L.* 499

And as provided in section 7:

"Upon such proof being made, the Surveyor-General, or other officer appointed by law for that purpose, shall issue cer-

tificates, under such rules and regulations as may be prescribed by the Commissioner of the General Land Office, *setting forth the facts in the case* and specifying the land to which the parties * * * patents shall issue for the land according to the certificate aforesaid. 9 *Stat. at Large*, 498, 499.

THIRD.

THE CONTRACT CLAUSES OF THE ACT.

The contract clause of the act of the 27th of September, 1850, are interposed by the defense as precluding the existence of the power of devise in Loring.

The first clause is found in section 4, and reads:

"*Provided further*, that all future contracts by any person or persons, entitled to the benefits of this act, for the sale of the land to which he or they may be entitled under this act, before he or they have received a patent therefor, shall be void." 9 *Stat. at Large*, 497.

The second clause upon this subject is embraced in section 12, substantially and to the effect:

"That all persons claiming land under the provisions of this act, by virtue of settlement and cultivation, commenced subsequent to the first day of December, 1850, shall first make affidavit * * * that the land claimed by them is for their own use and cultivation; that they are not acting directly or indirectly as agent for, or in the employment of others in making such claims; and that they have made no sale or transfer, or any arrangement or agreement for any sale, transfer or alienation of the same, or by which the said land shall enure to the benefit of any other person." 9 *Stat. at L.*, 499, 500.

Following is a provision subjecting a person guilty of false swearing to the pains and penalties of perjury. Both those

clauses are prospective. The first applying to contracts before as well as after the passage of the act; after the act, in express terms, and before it, by implication, but differing materially in effect. Future co tracts are declared void, implying also the validity of contracts entered into before the passage of the act.

The clause contained in section 12, applies to settlements commenced after the first day of December, 1850, and the affidavit is expressly made to apply to the date of initiating the claim, and exclusively relates to then-existing transactions in the nature of alienation distinguished from devise. The substance of the whole affidavit is affirmatively embraced in the words "that the land claimed is for their own use and cultivation."

A violation of the prohibition clause in section 4, does not forfeit or modify the estate. Such contracts are simply void. Neither of these prohibitions were intended to, or does, affect the devisability of the estate, or cuts off the inheritance. The prohibitory clause in section 4, is applicable as well to married persons, dying before issue of patent, as to a settler under section 8, yet the power of devise is expressly recognized in the former.

In the case of *Dolph* v. *Barney*, the court, through the chief-justice, says:

"The prohibition of sales was undoubtedly intended to protect the United States, to some extent, against fraudulent claims, and at the same time to place an obstacle in the way of an improvident disposition of their property by the settler, under the influence of the new order of things; but at all times the husband or wife taking under section 4, could cut off a child or heir by will."—7 *Otto*, 657.

The wording of the statute does not bring the power of

devisee within the mischief intended to be prevented, and the opinion of the court I have just quoted so declares.

The general powers of devise and the transmission of the inheritance is expressly recognized in the alien clause in section 4. And it matters not whether the death of the alien be before or after the expiration of the four years continued residence; whether he be single or married; whether he settled before or after the passage of the act, in either event he comes under the prohibition of future sales, yet at all times he is recognized as possessed of the general powers of devise.

It cannot for a moment be supposed that Congress intended to give to an alien an exceptional advantage over American citizens, who had settled the country, from the British Government, and made it an easy and peaceable conquest to the jurisdiction of the constitution and laws of the United States. Neither is it reasonable to suppose, from the circumstances or the language of the clause, that the death of the alien is confined to a period subsequent to the expiration of the four years' residence, because that would exclude the alien from the benefits of section 8, in case of his death before the expiration of the four years residence, and before completion of naturalization, and would conflict directly with the clause respecting the death of married persons after the expiration of the four years, and before the issue of patent, in this, that if he was a married person, the survivor would be cut off by the express provision with reference to inheritance and devise contained in the alien clause. The language in the alien clause is "having made his declaration of intention to become a citizen of the United States, *after the passage of this act*, shall die before his naturalization shall be completed, the possessory rights acquired by him under the provisions of this act shall

descend to his heirs at law, or pass to his devisees, to whom, as the case may be, the patent shall issue."

Evidently this contemplates the possibility of death at any time *after* the declaration of intention and before the completion of naturalization; if before the expiration of four years, it is construed in connection with section 8, and if after the expiration of four years, it is construed in connection with the clause in relation to married persons; but whether construed in connection with either, possessing the power of devise, and transmission of inheritance.

If it may be said that the recognition of the power of devise and transmission of inheritance in the case of married persons, and in the case of an alien, are *exceptional grants of the power of devise*, the reply is, that the peculiar provisions in respect to both—the first under the law of survivorship, the second that of naturalization, made it appropriate to repel any idea, that by reason thereof, the general power of devise inherent in the nature of the estate, and contemplated in the laws of the Provisional and Territorial Governments, was thereby cut off; so that these clauses did not grant, but recognized the existence of the power of devise, and repelled the idea that under any circumstances it was intended to be restricted or denied.

Furthermore, the power of devise was not within the mischief intended by Congress to be guarded against, in the enactments prohibitory of sales, and providing for the settler's initiatory oath.

Myers v. *Croft*, 13 Wall., 295, 296.

Bamy v. *Dolph*, 7 Otto, 658.

Lamb v. *Davenport*, 18 Wall., 314, 315.

It has been said and repeated by the court, that these prohibitions and oaths were mainly intended to guard against

improvident sales, as well as to effectuate a policy of the Government, originating from the frequent frauds committed by speculators in the public lands, and not from any supposed evils that might result from the freedom of devise, and while the power of devise of any interest in real property conforms to general policy, and was expressly recognized by statute before the Donation Law, I can conceive of no case, and I believe none exists, where it would be possible for the testator to defraud anybody, much less the United States, through the instrumentality of devise in this case or any other like it, any more than in the ordinary cases of devise of real property, within and subject to the laws of the several states.

As to the settler's oath, provided for in section 12, it is at least as far from affecting the power of devise, as that for the prohibition of sales. It has in view the same class of mischief intended to be prevented by the prohibitions in section 4.

This oath is quite similar, and has the same object in view as section 13 of the Pre-emption Law of 1841, upon which the opinion of this court has already been pronounced. The wording of the oath in that act, so far as it applies to this case, is:

"Nor hath he or she settled upon and improved said land, to sell the same on speculation, but in good faith to appropriate it to his or her own exclusive use or benefit; and that he or she has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatsoever, by which the title, which he or she might acquire from the Government of the United States, should enure, in whole or in part, to the benefit of any person except himself or herself."—5 *Stat. at Large*, 456–7.

In the case of *Myers* v. *Croft*, Mr. Justice Davis, delivering the opinion of the court, says:

"It had been the well defined policy of Congress, in passing these laws, not to allow their benefit to enure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands on account of their withdrawal from sale, would procure middle men to occupy them temporarily, with indifferent improvements, under an agreement to convey them so soon as they were entered by virtue of these pre-emption rights. When this was done, and the speculation accomplished, the lands were abandoned."—13 *Wall.*, 295, 296.

Here the court announces the policy of the Government, in the adoption of the settler's oath under the Pre-emption Law, and (the opinion) goes on to show that what is termed the settler's oath, similar to that in section 12 of the Donation Law, applies to sales or arrangements with speculators at, and prior to, the date of the initiatory oath, and had no relation to bona-fide sales made afterwards.

So that a devise, taking effect as it does, after the death of the settler, is in no manner affected by the oath or prohibitory clauses of the act, but is left to be determined, as already shown, that the heirs take by descent.

In conclusion upon this question, whether the heirs at law, in this case, take by descent or purchase, the general history of congressional legislation shows, that in all cases where the lands are to enure to the heirs of a deceased claimant, it is intended that they shall be in by descent, and that in addition to provisions for descent and devise, no instance can be found where Congress has interposed against devise; and in all cases where Congress has legislated upon the subject of succession, it has been to the effect of creating or recognizing inheritance.

The first act of Congress upon this subject, provided for

descent and devise of real estate. This was the Ordinance of 1787, providing a government for the North-western Territory. The first section provides: "That estates, both of resident and non-resident, and non-resident proprietors in said Territory, shall descend to and be distributed among their children, and the descendants of a deceased child in equal parts, * * * "and until the Governor and judges shall adopt laws as hereinafter mentioned, estates in the said territory may be devised or bequeathed by will in writing, etc."

And like our Donation Law, deferring to the existing state of affairs, they saved to the inhabitants of certain districts the customs and laws in force among them, relative to the descent and conveyance of property, and without infringing upon these provisions, provided that the legislature of those districts and new states, should never interfere with the primary disposal of the soil by the United States in Congress assembled; nor with any regulations Congress may find necessary for securing the title in such soil to bonafide purchasers, and that the territory and state should forever remain subject to all the acts and ordinances of the United States in Congress assembled. One of such ordinances was the very ordinance of descent and devise.

I cannot as well describe the spirit and intent of that ordinance, as by quoting from the preliminary sketch by the late Chief-Justice of this Court, the honored Salmon P. Chase, published in 1833, to be found in *Vol. I of Chase's Statutes.*

The author says:

"It was adopted after discussion, without the slightest alteration, and with but one dissenting voice. The framer, and as to some of the most important provisions, the author, of this great fundamental law, destined to exert a mighty and enduring influence upon the happiness and prosperity of millions, was Nathan Dane of Massachusetts. To him, in

an especial manner, are the people of the North-Western States indebted for the restriction, upon legislative interferance, with private contracts, which, in every fluctuation of fortune, has been the safeguard of the public morals and of individual rights." * * * * * * *

"By that (the ordinance of 1787,) provision was made for successive forms of Territorial Government, adapted to successive steps of advancement in the settlement of the Western country. It comprehended an intelligible system of law on descent and conveyance of real property, and the transfer of goods. It also contained five articles of compact between the original states and the people and states of the Territory, establishing certain great fundamental principles of governmental duty and private rights, as the basis of all future constitutions and legislation, unalterable and indestructible, except by that common and final ruin, which, as it has overtaken all former systems of human polity, may yet overwhelm our American Union. Never, probably, in the history of the world, did a measure of legislation so accurately fulfill, and yet so mightily exceed the anticipations of the legislators."

"The ordinance has been well described as having been a pillar of cloud by day and of fire by night, in the settlement and government of the North-Western States. When the settlers went into the wilderness, they found the law already there; it was impressed upon the soil itself, while it yet bore up nothing but the forest."—1 *Chase's Stat,* 16, 17.

This instrument, so happily described by the great mind of the author, has been extended to nearly, if not all, of the Territorial Governments since organized. As an ark of safety, it has been carried from one Territory to another; from Wisconsin, the last Territory to which it was originally applied, to Iowa, thence to Minnesota, Oregon, Kansas, Nebraska, Dakota, Wyoming, Colorado, New Mexico, and Arizona, and there stands as a beacon light to the drifting ship of distressed Mexico.

In all the legislation of Congress upon this subject, from the date of the ordinance to the present time, the principles contained in that instrument, with reference to descent and devise, have been recognized. And whenever, in case of death of the donee or grantee, estates are recognized by any language whatever, as going, passing or descending to the children, heirs, or heirs at law of the deceased, it has been understood by Congress to be by inheritance subject to devise.

While there are numerous acts of Congress prior to 1836 recognizing the right of the heirs and legal representatives of deceased pre-emtioners to perfect their claims, I deem it only necessary to refer to the act of May 20, 1836, as showing the intent with which patents issue to heirs. That act provides:

"That in all cases where patents for public land have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died or who shall hereafter die before the date of such patent, the title to the land designated therein shall enure to and become vested in the heirs, devisees or assignees of such deceased patentee, as if the patent had issued to the deceased person during life, and the provisions of this act shall be construed to extend to patents for land within the Virginia Military District in the State of Ohio." 5 *Stat. at L.* 31.

Many other acts of similar character may be found, they show a steady settled policy in this respect to treat the property as belonging to the estate of the ancestor and as to descending to his heirs.

II.

STATUTE OF LIMITATIONS.

The second and remaining ground of demurrer is, that this suit is barred by the Statute of Limitations of the *State of Oregon in relation to suits in Equity.*

The grounds of demurrer are set forth as follows:

"That the matters and things set forth in the bill as grounds for relief were had, done and transpired before the commencement of this suit, more than five years from the alleged date of the patent, to-wit, May 9, 1866." *Pr. Rec. p.* 9.

The section of law relied upon in support of the demurrer is as follows: "That section 378 of an act entitled '*an act to provide a code of civil proceedure,*' *approved October* 2, 1862, be repealed, and the following enacted instead thereof." *Act of Oregon of* 1870, *p.*

"Section 378. A suit shall only be commenced within the time limited to commence an action as provided in title II of chapter 1 of this code; and a suit for the determination of any right or claim to, or interest in real property, shall be deemed within the limitation provided for actions for the recovery of the possession of real property." (Thus far the section is a re-enactment of the section repealed.) It continues: "But no suit shall be maintained to set aside, cancel, annul, or otherwise affect a patent to lands issued by the United States, or this State, or to compel any person claiming or holding under such patent, to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust for, or to the use and benefit of such plaintiff, for, or on account of any matter, thing, or transaction, which was had, done, or transpired prior to the date of such patent, unless such suit is commenced *within five years from the date of such patent, or within one year from the passage of this act.* In

a suit upon a new promise, fraud or mistake, the limitation shall be only deemed to commence from the making of the new promise or the discovery of the fraud or mistake." *Laws of Oregan of* 1874, *pp.* 189, 190.

It will be seen that the demurrer relies solely upon the statutory effect upon this suit, and does not open to discussion the question of the staleness of the demand as it might or might not be manifest from a consideration of the merits of the bill.

The Circuit Court substantially overrules the demurrer as it seeks to enforce the provision of section 378, but adopts the same statute as a guide in determining that this suit should be barred by lapse of time. The effect upon the complainants' suit is the same, and the innovation upon the jurisdiction of the Federal Courts is no less, whether this local equity limitation is a bar by its terms, or is taken as a guide; either, utterly destroys the foundation upon which rests the powers and jurisdiction of the Federal Courts, as Courts of Equity, as the same have been uniformly held by this Court since the foundation of the Government.

The special limitation in suits in equity, in respect to *patents*, by whatever means obtained, as provided in section 378, is made an exception to the general rule laid down in the section, the same rule universally prevailing in this court, and still left by this act as to cases at law. The Circuit Court, in its opinion, say:

"It is a singular case. Our attention has not been called to another like it, or to any authority directly bearing upon it." 3 *Sawyer*, 516.

It is indeed a singular case, and it is not surprising that the attention of the court had never been called to another like it, for such rule is without precedent in all the history of

American or English jurisprudence. Upon its face, it bears the marks of disingenious interpolation, and what is no less surprising is, that the Circuit Court, with the two rules before it—one conforming to the established rules of this Court, having its foundation in the practice and usage of the English Court of Chancery almost from time immemorial, and the other a new rule, at variance with all precedent, and both as to limitation, and the subject matter, an innovation upon the powers of the Government of the United States and the jurisdiction of its courts, should have adopted such a rule as a guide.

The subject matter of the bill relates to the primary disposal of the soil of the United States, and the object of the bill is to determine between two claimants to the soil under those laws, and whether the patent of the one was not obtained by fraud and perjury. As a question relating to the primary disposal of the soil, neither the territory or state could make a valid law interfering with it. By the 4th Article of the Ordinance of July, 1787, which, by the Act of Congress of August 14th, 1848, was extended over the Territory of Oregon, it is provided:

"That the legislatures of those districts or new states, shall never interfere with the primary disposal of the soil by the United States in Congress assembled."

In the third section of the fourth Article of the Constitution of the United States, adopted in the same year, it is provided:

"Congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property of the United States."

By the act of Congress of the 14th February, 1859, for the admission of Oregon into the Union, it is provided:

"That the people of Oregon shall provide by ordinance, irrevocable without the consent of the United States, that said state shall never interfere with the primary disposal of the soil within the same, by the United States, or with any regulations Congress may find necessary for securing title in said soil to bona-fide purchasers thereof."—*Act for admission of Oregon, Sec* 4, 11 *Stat. at Large*, 384.

The State of Oregon, by an ordinance of June 3, 1859, assented to and ratified the act of Congress *verbatim et literatim.*

Section 2 of article III of the Constitution of the United States, provides:

"That the judicial powers of the United States shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

The determination whether a patent has been regularly issued—issued to the proper party, together with all other questions pertaining to the settlement and consummation of titles, is reserved to the United States, and to its judiciary, and the state is prohibited from interfering with it. The state cannot confer upon its judiciary, jurisdiction to determine the validity or invalidity of any act done to the end of obtaining title from the United States to the soil. The Legislature of the state can pass no law limiting the jurisdiction of the Federal courts in respect to these questions. The amendment, therefore, to section 378, which took suits for determining such questions out of the general rules applying the limitation in ejectment, is unconstitutional and void.

SECOND.

THE ACT COULD NOT BE ADOPTED BY ANALOGY.

Independent of the want of validity of the act, in respect to the disposal of the soil, the court erred in adopting it as a a guide. There was nothing in the act to commend it to the favorable consideration of the court, nor anything in the bill out of the ordinary course of events, calling upon the court to seek for light in the direction of this act.

From the organization of the Provisional Government to the date of the amendment, a period of nearly forty years, no other legislation or rule of decision than that of applying the limitation in ejectment had prevailed. For nearly the whole period named, the legislatures had been content with confining the jurisdiction in equity to the principles and usages of courts of Equity, at the same time limiting actions of ejectment to twenty years. Section 378, as amended, preserving the analogy between actions at law and suits in equity, with the action of ejectment at twenty years, at the same time, in respect to such matters as contained in this bill, limiting the suit to five years, a period then already nearly expired, was, in itself, grounds for suspecting that the amendment did not originate in the general sense of justice in the community, and had been interpolated into the law for some sinister purpose.

It will all the time be borne in mind, that this act is one applying solely to proceedings in equity, so purports to be, the limitations at law still being twenty years.

So unreasonable and so contrary to all precedent, was that amendment, that the Legislature of Oregon, at its session of 1878, so amended the section as to restore the principle of analogy in limitation, between actions of ejectment and

suits in equity, for the same subject matter, fixing both at ten years.

While, as the court in its opinion admits, there is no authority for adopting the amendment in section 378, there is, within the range of the eye, in the same section, a provision conforming to a rule of ancient origin and of universal application, and sustained without, I believe, a single exception by the decisions of this Court. The provision referred to is:

"That a suit shall only be commenced within the time limited to commence an action, as provided in title 2 of chapter 1 of this code. And a suit for the determination of any right or claim to, or interest in, real property, shall be deemed within the limitation provided for actions for the recovery of the possession of real property."—*Laws of Oregon of* 1874, *p.* 189.

Viewing the two propositions thus brought in juxtaposition, the court, hesitating as it were between the two, states the case thus: "Whether the Court shall follow that statute, or the limitation of five years, contained in section 378, is the question."—*Hall* v. *Russell*, 3 Sawyer, 516.

In support of the twenty years' limitation, we have the settled doctrine of this Court, that the courts of the United States, as courts of Equity, are guided by the principles and usages of equity as administered by the high court of Chancery in England; that the Chancery jurisdiction is the same in all the states, and that the rule of decision is the same in all.

One among the oldest and most uniform rules adhered to by the Courts of Equity in England, is that the period which would bar an action of ejectment, had the plaintiff a legal title, will bar a suit in equity, the court adopting the rule at law by an analogy.

This principle is recognized by this Court, and adhered to

from an early period in the history of the Government to the present time.

Thomas v *Harris' heirs*, 10 Whea. 146.

Elmendorf v *Taylor*, 10 Whea. 152.

Miller v *McIntyre*, 6 Peters, 66.

Livingston v *Story*, 9 Pets. 654 to 658.

Boyle v *Zacharie*, 6 Pets. 658.

Banbien v *Banbien*, 23 How. 208.

In the case of *Coulson* v *Wallace*, the court says:

"The statute of limitation is applied by courts of equity in all cases where at law it might be pleaded, is a well settled principle." 9 *Pets.* 82.

In the case of *Rhode Island* v *Maryland*, the court say:

"In cases between individuals, where the statute of limitation would be a bar at law, the same rule is undoubtedly applied in a court of equity."

* * * * "The time necessary to operate as a bar in equity is fixed at twenty years, by analogy, to the statute of limitation." 15 *Pets.*, 372, 373.

In the case of *Bowman* v. *Wathen*, it is said the parties must stand or fall upon the settled principles which govern the action of this Court, and, quoting approvingly from the case of *Hovenden* v. *Lord Annesley*, 2 Sh. & Lef., in which Lord Redesdale lays it down as the common law of courts of equity.

"That every new right of action that accrues to a party must be acted upon at the utmost within twenty years." 1 *How.* 199.

In the case of *Mickaud* v. *Girod, et al*, it is laid down as the rule of decision in the United States Court that,

"Although the statutes of limitation do not apply to any equitable demand, courts of equity adopt the same limitation as a guide, in cases analogous to those in which the statute applies at law." 4 *How.*, 560, 561.

In the opinion of the court in the case of *Neves, et al* v. *Scott, et al,* the supremacy of the principles of equity, as administered by this Court, is placed beyond question. It ought, at least, to have had as much weight with the Circuit Court as the interpolation into section 378 of the revised statute of Oregon.

Justice Curtis, in delivering the opinion of the court, says:

"Whenever a case in equity may arise and be determined under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the Courts of the United States, and for this Court in the last resort, to decide what those principles are, and to apply such of them to each particular case as they may find justly applicable. These principles may make part of the law of a state, or they may have been modified by its legislation or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several states. But in all the states the equity law, recognized by the constitution and acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this Court. Such has long been the settled doctrine of this Court, repeatedly and steadily affirmed in whatever form the question has been presented." 13 *How.*, 272.

Applying the principles here announced to the question, whether the established rule of this Court, that the limitation in ejectment is the limitation in equity in respect to the same subject matter, or whether the interpolation into section 378, specifically limiting to five years a suit in equity to set aside a patent obtained by false representations and fraud, shall be taken as a guide, and especially when the limitation had expired before it took effect, and the principles announced would be quite significant to a court or a party disposed to set up an

abitrary discretion, for the long and firmly established rules of this Court.

Inasmuch as the objectionable limitation is an infringement upon the equity power and jurisdiction of the federal courts, and is legislation in violation of the compact by which the state is prohibited from interfering in any manner with the primary disposal of the soil, whether that interference be by way of limitation, having the effect to validate fraudulent titles or otherwise, in connection with the opinion of the court just read, I will recur to the opinion of the court, by Chief-Justice Marshall, in the case of *The United States* v. *Peters*. Olmstead had recovered judgment against the Rittenhouse Executor in the District Court, Judge Peters presiding. The Legislature of Pennsylvania passed an act demanding the money in Rittenhouse's hands, and, among other things, the act required the Governor of the state to protect the persons and property of the Rittenhouse executors against process issued out of any Federal court. A mandamus was issued to Judge Peters to show cause why he should not carry into effect the decree of the court. Return was made setting forth the act of the Legislature. Chief Justice Marshall, in delivering the opinion of the court, said:

"If the ultimate right to determine the jurisdiction of the courts of the Union, is placed by the constitution in the several State Legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the District Court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question."—5 *Cranch*, 136.

It was deliberately considered, and the mandamus made peremptory. This settled the question for Pennsylvania.

In the case of *Robinson* v. *Campbell*, an occasion was presented for construing Judiciary Act of 1792, on which the court says:

"That the act declares that the modes of proceeding in suits of Equity, shall be according to the principles, rules and usages, which belong to courts of Equity, as contra-distinguished from courts of common law."—3 *Whea.*, 221, 222.

Massachusetts in turn presented an occasion for this Court again to assert the supremacy of the equity jurisdiction of the Federal Court, in the case of the *United States* v. *Howland*. The act of Massachusetts allowed one creditor to sue the debtor of the debtor at law. The United States brought suit in equity against the debtor of her debtor. The objection was taken that the plaintiff, by the laws of Massachusetts, had a remedy at law. In delivering the opinion of the court, Chief Justice Marshal said:

"The courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers in all, and gives the same rule of decision; its jurisdiction in Massachusetts must be the same as in other states." 4 *Wheat.* 115.

In the case *Provort* v. *Gratz*, Story, Justice, said:

"It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon the principles of eternal justice, to be admitted to repel relief." 6 *Whea.* 497, 498.

In the case of *Payne* v. *Hook*, Justice Davis said, in delivering the opinion of the court:

"The theory of the objection is, that the Federal courts

of chancery sitting in Missouri will not enforce demands * * if the courts of the State having general chancery powers could not enforce similar demands * * * * If this position could be maintained, an important part of the jurisdiction conferred on the Federal Courts by the Constitution and laws of Congress would be abrogated." 7 *Wall.* 429.

In the case of *Broderick's Will*, the court says:

"Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States, so long as the equitable rights remain, yet an enlargement of the equitable rights may be administered by the Circuit Court as well as by the state courts." 21 *Wall.* 520.

In the case of *Noonan* v. *Lee*, Justice Swayne said, in delivering the opinion of the court:

"The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the Supreme Court. In all these respects they are unaffected by state legislation." 2 *Black.* 509.

In the case of *Gibson* v. *Chauteau*, the question respecting the disposition of the public lands by the United States, and the prohibition upon the state's interference is clearly and explicitly settled. Justice Field, in delivering the opinion of the court upon this point, said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition, and of making all needful rules and regulations. That power is subject to no limitation. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the person to whom the transfer shall be made. No state legislation can interfere

with this right, or embarass this exercise; and, to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compact, by which new states have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."—13 *Wall.*, 99. * * * * *

"it would amount to a denial of the power of disposal in Congress, if these benefits which should follow upon the acquisition of that title, could be forfeited, because they were not asserted before that title was issued."—13 *Wall.*, 100.

Then, if the state cannot interfere in the disposal of the soil, has no power to prescribe the times, the conditions, the mode of transferring, or designate the person to whom the transfer shall be made, and if no state legislation can interfere with these rights or embarass their exercise; if this Court, as a court of Equity, has established, by a course of uniform decisions, reaching back to the foundation of the Government, that in suits in Equity in respect to and for title to lands, it is governed by the limitation in ejectment, upon what theory does the Circuit Court undertake to establish a different rule? This is found, if anywhere, in this part of the opinion of the court:

"*An action at law to recover possession of this property, would not be barred by the laws of this state under twenty years.* Whether the court will follow that statute, *or the limitation of five years*, contained in section 378, is the question. *It is conceded that, in a case of equitable cognizance like this, the court is not bound by the statute of limitations*, but may, for good reason, apply a longer or a shorter time in bar of a suit. There is nothing in the circumstances in this case, or in the statute, which requires the court to lengthen the term, but rather the contrary."—3 *Sawyer*, 516.

Now, the statute of limitation in ejectment was twenty years, and as it is conceded by the court, "the National Courts,

as courts of equity, follow them." As we have shown, this rule is the same in every state, unaffected by state legislation. Not that 20 years is the uniform limit, but that the rule that the limitation in ejectment in each state, shall govern the Equity Courts of the United States, sitting in each state, shall be uniform, and the same in all the states, and as often as the states change the limitation in ejectment, the rule is applied accordingly.

We deny the proposition upon which the court rests for authority in changing this rule. We deny the proposition that the Circuit Court, in view of the repeated and uniform rulings and decisions of this Court, may, in a case like this, apply a longer or a shorter limitation. If they may, the reason of the rule ceases, and the rules of decision will not be the same in all the states. The circumstances with each particular case, will become the foundation of a new rule. It will become necessary in each particular case to burthen the bill with reasons for not bringing the suit sooner. Parties, in every case, ignorant of what limitation will be applied in their particular case, must be harrassed with detailing the history of their outgoings and incomings from one to twenty years. No, it is only in cases where the limitation at law does not apply that the court exercises its discretion.

The court was not asked to lengthen the term fixed by the general rule. It concedes twenty years to have been the rule of limitation. The plaintiffs relied upon that limitation. The court was not moved to shorten the term. The defendants only relied upon section 378, of five years as a bar. The five years had expired, or nearly so, when the act took effect. The act itself, as applied to this case, was in effect a limitation of one year from the date of its passage, and upon its face repulsive to every sense of equitable consideration, and has already received the seal of condemnation from a succeeding legislature.

The court say, "this statute (378) took effect nearly five years before the commencement of the suit, and no reason is given for delay," but overlook the fact that it was retrospection to the extent of nearly five years, and in its attempt to validate fraud and corruption by limiting the jurisdiction of courts of equity, so far from furnishing a guide to Courts of Equity of the United States, merited the contempt of all honest men.

It said, no reason is given for delay. There was no necessity for giving reasons for delay. We were far within the established rule and misled by the declaration of a new rule, which we had no right to anticipate would be adopted.

The statements in the bill, that the patentee, in circumstances of great destitution, had been taken upon his, Loring's farm, into his house, fed from his table, sheltered by his roof, supplied with teams and implements of husbandry, and afforded an opportunity of making a start in the world, should, upon the sudden death of the settler, claim his land, and instead of taking care of it for its owner, by the grossest fraud and misrepresentation, not to say perjury, obtain a patent for it, of which the defendant had notice, all admitted by the demurrer, are not such circumstances as ought to induce a court of equity to strain a point to shorten the limitation; and when to this, it is also stated that the defendant had, within two years preceding the commencement of this suit, pleaded as a defense to a suit by the heirs at law, the probate of the will and the rights of the complainants under it, that they had obtained the rights of the heirs at law for $5,000, when the land itself was worth more than twenty times the amount; upon such a state of facts, the statute of limitation upon principles of eternal justice, should not be permitted to repel relief.

In conclusion, I beg leave to quote further briefly from the closing paragraph of the opinion of the court. It says:

"Under these circumstances we think that the court ought to apply the shorter limitation of the two. Statutes of limitation are measures of public policy and expediency, and it is desirable that the rule should be the same in the National and State Courts. We think in this case the court may safely adopt the limitation prescribed by the laws of the State in its courts in like cases."

I do not, with my short vision, see exactly how it follows that, because statutes of limitation are measures of public policy and expediency, that, therefore, the rule should be the same in the National and State courts in cases where ejectment is limited to 20 years, and equitable jurisdiction in the Federal courts, over a fraudulent patent, are limited to less than one year. Had the court followed the rule as it existed before the interpolation in section 378, and as it existed in all cases except this one in the State Courts, it would have conformed the equity limitation by analogy to the limitation in an action of ejectment, and the State Courts in Equity, if they saw fit to conform to the limitation in ejectment, and thus adhere to a rule which marks the history of jurisprudence and of legislation for more than five hundred years. The proposition of the court that the Equity courts of the United States shall conform to the limitation prescribed to the Equity Courts of the state, in suits respecting real property, short of the limitation in ejectment, is just what I understood is contrary to the Constitution and laws of the United States and jurisdiction of this Court, and which this Court has always stood at the door ready to repel.

Recurring to the general lapse of time, although I do not, and did not when the demurrer was argued below, consider that it was a demurrer for lapse of time, at the time of the enactment of this extraordinarily exceptional limitation, the administrator, as the representative of the estate, was in pos-

session of the premises in pursuance of a recovery at law, and was defending the possession and title of Loring in a suit then pending in this Court, which was not decided until 1872.

In October, 1872, the heirs at law commenced their suit —a suit which substantially, though not legally, represented the interest of the devisees, and in which the defendants pleaded the will, as before mentioned, and which, if the suit had not been dismissed in October, 1872, would have called for an order making the executor and devisees parties.

It would have been an unnecessary embarrassment of the proceedings for the administrator with the will annexed and devisees, during the pendency of that suit, to have instituted another, more particularly as there was a friendly understanding between the heirs and devisees.

The devisees resided in the State of Ohio, a great distance from the locality of the suit. Their counsel did not regard the state statute, in relation to equity suits in the State Court, as binding, or furnishing any rule of decision in the Federal Courts.

There was no circumstances or general sentiment calling for the enactment. On the contrary, the general sentiment in that section, where patentees had kept the community in dread, by a refusal to convey, at that very time, to execute deeds, called for a shorter limitation at law. While the effect of the limitation in equity restricted them to less than one year, the limitation at law gave to the parties, as in such cases as those of *Starr* v. *Stark*, 4 Otto, 490, and *Lamb* v. *Davenport*, 18 Wall., 316, twenty years; and as will be seen, this inequality was destroyed by the recent enactment of the Legislature.—*See Stat. of* 1878.

Although the enactment, by reason of the distant settlement and sparse population, and the promiscuously issued patents, and the peculiarity of the enactment, it was not gen-

erally known, yet when and where perceived, it was regarded as an outrage upon public justice.

How different this from the case of *Terry* v. *Anderson*, 5 Otto, 633, 634.

There the limitation at law and that in equity was the same, and not conflicting with the general rules of decisions of this Court, by which courts of equity apply the limitations at law in similar cases in equity. The rights were created and governed by the state law. The Chief-Justice, in delivering the opinion of this Court, says:

"The liability to be enforced in this case, is that of a stockholder, under an act of incorporation, for the ultimate redemption of the bills of a bank, *swept away by the disaster of a civil war, which had involved nearly all the people of the state in heavy pecuniary misfortunes.* * * * Ever since the close of the war the bills had ceased to pass at all from hand to hand as money, and had become subjects of bargain and sale as merchandise. Both, the original bill-holders and stock-holders, had suffered from the same cause. *The business interests of the entire people of the state had been overwhelmed by a calamity common to all. Society demanded that extraordinary efforts to get rid of old embarrassments, and permit a reorganization upon the basis of the new order of things.* This clearly presented a case for legislative interference within the just influence of constitutional limitations." 5 Otto, 633, 634.

The right involved in this case arises under a title to be granted by the United States. It depends wholly upon a law of the United States. No state law in any way affects it, and the common law comes in only as tending to show the meaning of the act and the nature of the estate granted. Can a state statute of limitation cut off this right? It is believed not in this case any more than in cases affecting copyrights and patent rights And it has been held that State statutes of

limitation cannot be applied to these acts so as to bar or cut them off.

Carhart v. *Austin*, 2 Fish. 543.
Parker v. *Hallock*, 2 Fish. 543.
Reed v. *Miller*, 3 Fish. 314.
Wood v. *Cleveland Rolling Mill*, 4 Fish. 556.
Anthony v. *Carroll*, 9 Official Gazette, 200.

This whole matter of granting the public lands, is as much within the exclusive cognizance of the United States, as is that of copyrights or patent rights. What was the estate granted Loring, what was in him at the time of his death, what right his heirs obtained at his death, and as the consequence thereof, and whether they obtained their rights through, for, or on his account, all depends upon the Donation law. All parties claim under the law of September 27th, 1850. The rights the parties have or may claim under this law, can not be affected by the 378th section of the Iowa Code, enacting a limitation for cases in equity in Oregon. I claim that that is not one of the laws falling within the 34th Section of the judiciary act re-enacted in the Rev. Stat. of the U. S., as sec. 721.

In the Supreme Court of the United States.

LYDIA C. HALL *et. al.*, *Appellants*,
vs.
EDWIN RUSSELL *et. al.*, *Appellees.*
No. 63.

The decree of the court below, dismissing the bill, ought to be affirmed, for the following reasons:

1st. Chapman, one of the complainants, and Page, one of the defendants, are citizens of the same State. The Circuit Court, therefore, had not jurisdiction. (Strowbridge et. al., *vs.* Curtis et. al., 3 Cranch, 267.) (Sewing Machine Companies, 18 Wallace, 553.)

2d. The bill alleges that Williams, one of the defendants, is a citizen of the District of Columbia. This is also fatal to the bill. (Barney *vs.* City of Baltimore, 6 Wallace, 280.)

3d. There is no allegation in the bill that Lydia C. Hall is the widow of Samuel Parker Hall; no allegation that Timothy W. Coolridge is married to Anna C. Hall; nothing to show how the other Halls were related to deceased. The only averment upon the subject is this: "Samuel Parker Hall departed this life leaving the complainants, the said widow and heirs-at-law." This is simply an averment that, when Hall died he left the persons named in the title of the bill. To aver that certain persons are heirs-at-law of another, is only to aver a conclusion of law. If the persons named in the title of the bill are the children of the deceased, they are his heirs-at-law; but if they are his "sisters, his cousins and his aunts," as they may be, for aught that appears, then they are not, if he left children. The relationship of the parties to the deceased must be set out so that the court can decide whether or not they are his heirs-at-law.

4. There is no averment in the bill that said Samuel Parker Hall died intestate.

5th. The bill shows that defendants claim under a patent for the land issued to the Delays. It also avers that this patent was obtained by false representations, but at the same time shows that the administrator of Loring (under whose will complainants make their claim) contested said alleged false representations before the Land Department. Chapman, administrator of Loring, claimed this land for Loring's estate and heirs. The Delays contested and claimed the land for themselves. The question was litigated before the Land Department and decided in favor of the Delays, and accordingly a patent was issued to them. There is no averment that any mistake of law was made by the Land Office in this matter.

There is no more fraud in this case than in any where one party asserts a claim to land which the other party denies. The evidence in support of the claim of each was submitted to the Land Office, and that office decided that such evidence supported the claim of the Delays. In such a case this court will not review the finding of the Land Office and set aside a patent founded thereon.

Johnson *vs.* Towenly, 13 Wallace, 72.
Shipley *vs.* Cowan, 1 Otto, 330.

6th. According to the bill Loring settled upon the land in question about the 1st day of April, 1852, and died thereon in January, A. D., 1853.

Section 8 of the Donation Law of Oregon, 9 Statutes, 498, provides, "That upon the death of any settler before the expiration of the four years' continued possession required by this act, all the right of the deceased under this act shall descend to the heirs at law of such settler, including the widow, when one is left, in equal parts and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to a patent."

By virtue of this section the land upon Loring's death was granted to his heirs at law. They took it as grantees of the Government. Loring's rights and everything based upon those rights ceased with his death. Loring could not lease, mortgage, sell or devise this land so as to affect the title after his death. Said section says that it shall go to his heirs at law, and this provision of the statute cannot be defeated by any act of the settler. These heirs at law took by purchase and not by descent. The land was granted over to them upon the death of the settler in consideration of his settlement. There was no statute of descents in Oregon at the time of Loring's death. There could be no descent under said section at common law, because the widow, if there was one, was entitled equally with the heirs, and besides the heirs were required to make proof to establish their right and obtain title.

Section 4 of said act prohibits all sales by the settler before patent, and a devise is only allowed after four years residence and cultivation. This clearly implies that a settler cannot make a valid devise before the expiration of said four years.

7th. The bill shows that the identical question in this case as to the validity of the patent to said Delay has been litigated and decided in another suit to which the said Chapman, as the representative of Loring's estate and the grantors of these defendants were parties. The Supreme Court of Oregon and this Court decided in that case that the heirs of Loring took by purchase and not by descent and in favor of said grantors. These decisions are a bar to this suit. Chapman came then as the administrator of Loring's estate; now he comes as the administrator of the same estate with the will and certain persons claiming under it annexed. The two cases are substantially the same.

This suit is barred by the statute of limitations. Section 378 of the Oregon code provides—

"That no suit shall be maintained to set aside, cancel, annul or otherwise affect a patent of land issued by the United States or by this State, or to compel any person claiming or holding under such patent to convey the land described therein or any portion of them to the plaintiff in such suit, or to hold the same in trust for or to the use and benefit of such plaintiff, for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent unless such suit is commenced within five years from the date of such patent or within one year from the passage of this act."

The act was passed in October, A. D., 1870.

The patent in this case was issued on the 9th day of May, 1866, and this suit was commenced October 2d, 1875. When the bar appears upon the face of the bill it may be set up by demurrer.

(Story's Equity Pleading, Secs. 503 and 760.)

This is a Stale claim and Courts of Equity will reject it upon that ground. Loring died in January, 1853. Hall's right to this land, if he had any, occurred at that time, and twenty-two years before the suit is brought. No reason is assigned for this delay. Seventeen years elapsed between the death of Loring and the proving of the will under which complainants claim. This delay is also unexplained. This Court decided in ——X—— at the last term that a delay of fourteen years in asserting a claim made it so stale that equity would refuse to allow it.

GEO. H. WILLIAMS,
For Appellees.